

UNITED STATES DISTRICT COURT

ORIGINAL

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable YVONNE GONZALEZ ROGERS, Judge

EPIC GAMES, INC.,)	Evidentiary Hearing
)	
Plaintiff,)	Volume 6
)	
vs.)	NO. C 20-05640 YGR
)	
APPLE, INC.,)	Pages 904 - 1118
)	
Defendant.)	Oakland, California
_____)	Friday, May 31, 2024

REPORTER'S TRANSCRIPT OF PROCEEDINGS

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(Appearances continued next page)

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I N D E X

FRIDAY, MAY 31, 2024 - VOLUME 6

PLAINTIFF'S WITNESSES**PAGE****VOL.**

SIMON, BENJAMIN

(SWORN)

933

6

DIRECT EXAMINATION BY MR. BORNSTEIN

933

6

CROSS-EXAMINATION BY MR. LO

963

6

REDIRECT EXAMINATION BY MR. BORNSTEIN

1028

6

SHOBIN, ALEC

(SWORN)

1039

6

DIRECT EXAMINATION BY MS. MOSKOWITZ

1039

6

CROSS-EXAMINATION BY MR. LO

1060

6

REDIRECT EXAMINATION BY MS. MOSKOWITZ

1113

6

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Friday, May 31, 2024

9:00 A.M.

P R O C E E D I N G S

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THE CLERK: Good morning. These proceedings are being court-reported by this Court. Any other recording of this proceeding, either by video, audio, including screenshots or other copying of the hearing is strictly prohibited.

Your Honor, now calling the civil matter 20-CV-5640, Epic Games vs. Apple Inc.

Parties, please state your appearances for the record, starting with the plaintiffs.

MR. BORNSTEIN: Good morning, Your Honor.

THE COURT: Mr. Bornstein, good morning.

MR. BORNSTEIN: Thank you. Good morning. Gary Bornstein for Epic. Our numbers are dwindling today. I have with me Ms. Moskowitz, Mr. Even, and Mr. Zaken.

THE COURT: Okay. Good morning.

MR. PERRY: Good morning, Your Honor.

THE COURT: Mr. Perry, good morning.

MR. PERRY: Mark Perry for Apple. With me today are Mr. Doren, Mr. Lo, Mr. Bedel, Ms. Sesia, and Heather Grenier from Apple.

THE COURT: Okay. Good morning.

Well, I'm glad to be testing out the -- my configuration.

MR. PERRY: A little more real estate over here this

1 morning, Your Honor.

2 **THE COURT:** Well, there's a little more to
3 accommodate on that side. But glad to know it actually works
4 before I get them all in here.

5 Okay. Anything that we need to take care of before we get
6 started?

7 **MR. BORNSTEIN:** We do have one matter, Your Honor.
8 And if I may, I'd ask Mr. Even to address it.

9 **THE COURT:** Sure. Mr. Even, good morning.

10 **MR. EVEN:** Good morning, Your Honor. So, Your Honor,
11 I wanted to speak briefly about the document production. We
12 were hoping to question Mr. Oliver about it today. We were
13 told before the 17th, I believe, that he'll be out after the
14 17th. We hadn't realized that goes all the way through today,
15 but we were told he's still out of the country. We asked when
16 he's going to be back --

17 **THE COURT:** So and he's not in the country right now?

18 **MR. EVEN:** That's my understanding, Your Honor.

19 **MR. PERRY:** That is correct, Your Honor.

20 **THE COURT:** So, and when did we know this? Because I
21 told you before, one, that he had to come back, and two, that
22 this would be the last day.

23 **MR. PERRY:** Your Honor, we discussed this with Epic
24 before he testified two weeks ago, I believe, that he would be
25 out for two weeks.

1 **THE COURT:** And you gave them the dates?

2 **MR. PERRY:** I said two weeks, Your Honor. I'm not
3 sure I gave precise dates.

4 **MR. EVEN:** I don't recall anybody telling us two
5 weeks. We were told he's not going to be available after the
6 17th. We hadn't realized it's two weeks.

7 **THE COURT:** When is he back?

8 **MR. PERRY:** He returns, Your Honor, I believe
9 June 9th or 10th.

10 **THE COURT:** Well, how is -- how is that two weeks?

11 **MR. PERRY:** Your Honor, I -- I had understood it was
12 two weeks when he testified last time. I learned over the
13 weekend when Mr. Even inquired that he is -- that he is no
14 longer -- that he is still out of the country.

15 **THE COURT:** Is he on Apple business?

16 **MR. PERRY:** I don't know what he's doing, Your Honor.

17 **THE COURT:** Well, he may have to get back here.

18 **MR. EVEN:** So --

19 **THE COURT:** I want to know what he's doing. And did
20 you put it in writing? Is there some kind of clarification
21 that we can have with respect to time?

22 **MR. PERRY:** We did not put it in writing, Your Honor.
23 I had a discussion with Mr. Bornstein when we were discussing
24 the order of witnesses two weeks ago and who was available
25 when, and informed them at that time that Mr. Oliver would be

1 gone for two weeks from then.

2 And I apologize, I don't have a calendar in front of me.
3 It was the day before he testified the last time -- or the
4 last time.

5 **THE COURT:** He testified --

6 Ms. Richman, good morning.

7 **MS. RICHMAN:** Good morning, Your Honor.

8 **THE COURT:** He testified on 5/16 and 5/17 according
9 to my notes. Two weeks from that time is May 30th or
10 May 31st, and now you're saying it's June 10th?

11 **MR. PERRY:** Yes, Your Honor.

12 **THE COURT:** Well, he may have to fly back, wherever
13 he is. That's on you.

14 **MR. EVEN:** So before we question him, Your Honor, we
15 have some serious concerns about the documents that were
16 produced.

17 **THE COURT:** All right.

18 **MR. EVEN:** Which we have raised with Apple. I have a
19 binder, if I may give Your Honor, of some examples.

20 **THE COURT:** Sure.

21 (Pause in the proceedings.)

22 **MR. EVEN:** So the first thing, Your Honor, and the
23 most concerning perhaps is that after all the back and forth
24 between Your Honor and -- and Mr. Oliver, Your Honor told
25 Mr. Oliver -- Mr. Oliver to go back, review his notes, and any

1 notes that relate to this issue to produce. We understand
2 that's not been done.

3 **THE COURT:** You understand that it's not been done?

4 **MR. EVEN:** Correct, Your Honor. Because a lot of
5 these documents -- and Your Honor can begin looking at tab F
6 in the binder. And behind that, Your Honor, you can see that
7 most of this is redacted, and I'll talk to that in a bit, but
8 the last page is an email from Mr. Jeff Guebert where he
9 writes "Meeting notes from today's discussion have been
10 captured in Quip," Q-U-I-P, "and are part of our folder that
11 we will be using for this project." And then there are
12 references to some other documents in Quip.

13 And behind tab G, there's an email from Tanya Washburn
14 saying, "Hi everyone, Here with a link --"

15 **THE COURT:** What is Quip?

16 **MR. EVEN:** Quip, we understand is some product
17 management repository. We've asked Apple to produce documents
18 from it. All of these emails say that notes, drafts, all of
19 these things, this entire project was apparently handled on
20 this platform. Apple informed us that they did not, quote,
21 unquote, chase the links and did not produce anything from
22 Quip. We don't have any notes from any meeting in what was
23 produced.

24 Now we don't understand this to be a chase --

25 **THE COURT:** First of all, I -- just to make sure that

1 the record is clear. The code name for this was Wisconsin. I
2 recall the testimony being that there were other code names.
3 What were the other code names?

4 **MR. PERRY:** Your Honor, the previous code name was
5 Michigan. The final version was Wisconsin, is my
6 understanding from the testimony.

7 **THE COURT:** And so why -- well, your response.

8 **MR. PERRY:** Your Honor, the Court asked Mr. Oliver to
9 search his emails, iMessages and Slacks for communications
10 regarding the project. Mr. Oliver did that the day after he
11 testified -- or the day of his testimony and the day after,
12 and found approximately 800 of those communications, all of
13 which we have produced both to the Court and to Epic. We have
14 made redactions for confidentiality and privilege in keeping
15 with the other documents produced during the hearing.

16 We did not as -- "chase" is the word I gather the
17 e-discovery folks used, the links in those communications. We
18 understand the request to be for the communications
19 themselves. The parties in this proceeding have not routinely
20 chased links in e-discovery. We did include attachments,
21 and -- and that is the production that was made is the actual
22 communications.

23 There's a second set of documents. To be clear, the Court
24 also asked for some case studies and other backup for certain
25 assumptions, and there's approximately 40 documents that refer

1 to that as well. So that was two -- two components of the
2 Mr. Oliver production.

3 **THE COURT:** Do you have what my instruction was? I
4 don't recall using the word Slack iMessage.

5 **MR. EVEN:** I have what was exchanged. I'm sure we
6 have the order somewhere if somebody can get it for me.

7 But in the exchange in court, you asked Mr. Oliver where
8 he's keeping his stuff. He said it's on his computer in some
9 note-keeping thing. And you said today you'll go back, you'll
10 review your notes. Any notes that -- and any notes that
11 relate to this issue I want produced. So --

12 **THE COURT:** "Any" is pretty broad.

13 **MR. PERRY:** Yes, Your Honor is --

14 **THE COURT:** So and does he have access to Quip?

15 **MR. PERRY:** Well, he has access to Quip. Quip is a
16 sort of white board that is an ongoing thing. It's not frozen
17 in time at the time that communication was made. In other
18 words, there is access to Quip. It is a -- it is a
19 collaborative --

20 **THE COURT:** The whole point, Mr. Perry, was to get
21 the documents relative to the decision-making with respect to
22 the issues in front of the Court. That was the point.

23 **MR. PERRY:** Yes, Your Honor.

24 **THE COURT:** And you didn't do it.

25 **MR. PERRY:** Well, Your Honor, with respect, the

1 Court -- as we understood, the order was to produce the notes,
2 emails, Slack, iMessages.

3 **THE COURT:** Where do I say Slack, email, and
4 iMessage?

5 **MR. PERRY:** Well, Your Honor, it was in the
6 discussion with Mr. Oliver. You asked -- the Court asked what
7 basis of communications, and then the -- the direction was --

8 **THE COURT:** Okay --

9 **MR. PERRY:** You're going to --

10 **THE COURT:** -- so let me make it clear then if you
11 obviously didn't understand.

12 I want all of Apple's documents relative to its
13 decision-making process with respect to the issues in front of
14 the Court. All of them. All. If there is a concern, then be
15 overly broad.

16 **MR. PERRY:** Your Honor, may I ask time parameter for
17 the Court's request.

18 **THE COURT:** All.

19 **MR. PERRY:** Thank you, Your Honor.

20 **THE COURT:** So let's say from the day that my
21 decision came out until the present.

22 **MR. PERRY:** Yes, Your Honor. That is not what is in
23 this production, to be clear. That is not what we attempted
24 in this production. This production was Mr. Oliver's
25 documents. I just want to make that --

1 **THE COURT:** So the proceedings here are whether or
2 not to hold you in contempt, that -- not you obviously
3 personally, but Apple -- for failure to comply with my order.

4 I have been told in this proceeding that much of the
5 decision-making was not written, there were lots of
6 communications and lots of meetings, which is not entirely
7 beyond the pale given that Apple has been held to account many
8 times, and part of the reason for the accounting is because
9 there are things in emails. So now you all don't write things
10 down anymore.

11 I need to understand what it was people were thinking and
12 how you got to a 27 percent charge from a 30 percent charge
13 that had been found to be anti-competitive.

14 So am I now clear?

15 **MR. PERRY:** It's very clear, Your Honor.

16 **THE COURT:** Mr. Even.

17 **MR. EVEN:** Yeah, and so -- so one correction on that,
18 Your Honor, is that to be clear, the emails in tabs F and G
19 and H with the links to the notes in Quip are emails to
20 Mr. Oliver. So he has the emails. That's why they were
21 produced, I assume, with the links and he had the access.

22 We also have an issue, Your Honor, with the documents that
23 were produced because a lot of them were redacted, some
24 documents were withheld. We never got a priv log. Some of
25 them were redacted on the basis of confidentiality which we're

1 not sure about the reason for.

2 But to give Your Honor some examples, one is behind tab D
3 where, for instance --

4 **THE COURT:** Well, let's take a look at tab D.

5 **MR. EVEN:** So we have a --

6 **THE COURT:** So I'm going to ask some questions.

7 There are three people who are redacted in terms of chat
8 participants. What is the basis for the redaction?

9 **MR. PERRY:** Your Honor, I don't have the unredacted
10 version of this with me. I apologize.

11 **THE COURT:** Well, who is -- who redacted it then?

12 **MR. PERRY:** May I have a moment, Your Honor?

13 **THE COURT:** You may.

14 (Pause in the proceedings.)

15 **UNIDENTIFIED SPEAKER:** Those redactions --

16 **THE COURT:** Who are you?

17 **MR. PERRY:** Apologize. This is Dana Craig, Your
18 Honor, also from Gibson Dunn, representing Apple, who assisted
19 with the document production.

20 **THE COURT:** And are you a lawyer?

21 **MS. CRAIG:** Yes, I am, Your Honor.

22 **THE COURT:** All right.

23 **MS. CRAIG:** Those redactions are phone numbers, Your
24 Honor.

25 **THE COURT:** All right. On the next page, what is the

1 basis for the redaction that says "Confidential"?

2 **MS. CRAIG:** I would have to see the document. My
3 guess is that -- yeah, I would have to see the document, Your
4 Honor.

5 **THE COURT:** Okay. Go find it.

6 **MS. CRAIG:** Okay.

7 **THE COURT:** That would be now.

8 **MS. CRAIG:** Okay.

9 **MR. EVEN:** So the point, Your Honor, we wouldn't even
10 know this document is relevant because the only relevant
11 content of the document was fully redacted for
12 confidentiality. All I have left is "Do you have a minute?"
13 and "Can I call you?"

14 **THE COURT:** I agree.

15 **MR. EVEN:** Another example is in tab A. This one is
16 redacted for privilege. This is an email from Tanya Washburn,
17 who we understand to not be a lawyer, to Matt Fischer.

18 **THE COURT:** Tab which?

19 **MR. EVEN:** A.

20 **THE COURT:** H?

21 **MR. EVEN:** A, as in apple. Sorry, Your Honor.

22 **THE COURT:** A, as in apple.

23 **MR. EVEN:** Yes.

24 So it's an email to more than a dozen people including
25 Mr. Carson, including Mr. Fischer.

1 **THE COURT:** And who's Tanya?

2 **MR. EVEN:** The subject is Wisconsin prep.

3 **THE COURT:** And who's Tanya Washburn?

4 **MR. EVEN:** I understand she's a nonlawyer, Your
5 Honor. And this is about a meeting of this work group, and
6 the entire substantive content is redacted.

7 **THE COURT:** Where is the lawyer?

8 **MR. EVEN:** So there are lawyers, I understand, and
9 Mr. Perry may speak more to that, in the "To" line, but there
10 are many who are not lawyers. And this is a big group as we
11 heard last week. All the Wisconsin meetings included lawyers
12 and nonlawyers.

13 **THE COURT:** So this is -- this is from June of 2023.

14 **MR. EVEN:** Yes, Your Honor.

15 **THE COURT:** All right.

16 **MR. EVEN:** Another example is behind tab E,
17 Your Honor, where there's a PDF of what design we'll present
18 to Phil, who we understand to be Mr. Schiller, for Wisconsin
19 tomorrow. This is written from Terry Liu, who I believe is
20 not a lawyer although I'm not sure.

21 I'm guessing this is another version of the deck that
22 we've all been discussing. But the document itself was
23 withheld for privilege. So I have something that says here's
24 the PDF, but I have no ability to question Mr. Oliver at all.

25 **THE COURT:** So are you working on a privilege log?

1 **MR. PERRY:** Yes, Your Honor.

2 **THE COURT:** And when is it going to be done?

3 **MR. PERRY:** I believe it is done this week or early
4 next week, I believe it is done. We have been working on it
5 since Mr. Even raised this issue.

6 We also, just to be clear, offered to meet and confer on
7 any particular documents. This is the first time we're
8 hearing specifics. You know, we could explain these things,
9 in other words, with them in front of us rather than here.
10 That conversation has not been had between the parties.

11 But, yes, we are working on the privilege log and we will
12 produce it.

13 **MR. EVEN:** To be clear, that's not what was
14 represented to us, Your Honor. What was represented to us is
15 that Your Honor did not ask for a priv log and therefore there
16 won't be one.

17 **THE COURT:** Well, I'm assuming that you don't want to
18 produce everything, that you actually do want to withhold
19 stuff on grounds of privilege. And if you are, then there
20 needs to be a log.

21 **MR. PERRY:** Yes, Your Honor.

22 **THE COURT:** That's standard protocol. I shouldn't
23 have to tell you that.

24 **MR. PERRY:** We -- we are -- as I just said, we are --
25 have been working on the log and it is almost completed for

1 this production.

2 **THE COURT:** How long is it going to take you to get
3 the actual full production that I just ordered?

4 **MR. PERRY:** Your Honor -- yes. If I could make three
5 points about that, please.

6 First, we will check. "I don't know" is the straight
7 answer to your question. I don't know how long it will take,
8 but we will find out.

9 Second, you know, Epic didn't seek any of this, to be
10 clear, before the hearing began. We made that point in the
11 papers. They did not seek any discovery.

12 I understand the Court's order, but I wish to be clear
13 that this is coming from the Court, not from Epic. And we
14 will find out the answer.

15 The third is when would the Court like to get back to
16 us -- us to get back to you with --

17 **THE COURT:** You're going to talk about it now. I'm
18 going to have a decision now. So we'll stand in recess. I'll
19 give you 45 minutes to figure it out. I'll be back here at
20 10:00.

21 **MR. PERRY:** Thank you, Your Honor.

22 (Recess taken at 9:20 A.M.; proceedings resumed at
23 10:02 A.M.)

24 **THE COURT:** All right. We are back on the record.
25 Please be seated.

1 The record will reflect that the parties are present.

2 Mr. Even, Mr. Perry, where do we stand?

3 **MR. PERRY:** Your Honor, Mark Perry for Apple.

4 We have consulted the folks that are here in the courtroom
5 regarding the Court's request for all information related to
6 injunction compliance from September 10th, 2021, through
7 January 16th, 2024. And our preliminary assessment -- and
8 we'd need to confirm some of this, Your Honor -- is that it
9 would involve potentially hundreds of custodians, particularly
10 if we include all the engineering work, which hasn't really
11 been the subject of the testimony here, but many, many
12 engineers were involved.

13 We estimate, Your Honor, that if we limited the search to
14 the commission issues that have been the focus of many of the
15 Court's questions, it would be up to 50 custodians.

16 As with any document production, we'd need to balance, you
17 know, the time to completion with -- with completeness.

18 If we could agree with a custodian list with Epic, I think
19 we all know who the principal players are from what we've done
20 so far, and search terms, as we did at the merits stage. And
21 just reference, Your Honor, at the merits stage, we agreed on
22 24 custodians, and that took about four months on top of the
23 production that had already been done.

24 We think we could do this in approximately three months.

25 We could do some of it on the back end. If we had a

1 custodian list and search terms, we can do automatic searches.
2 Some of it will require front-end searches.

3 This issue of the links, they take significantly more
4 time. They cannot be automatically searched. Judge Hixson
5 held in the *Pepper* case that they don't -- that Apple doesn't
6 produce all of them but the parties negotiate which ones to
7 chase, and we would propose something like that.

8 And then given the nature of the project, attorneys were
9 involved, as the Court is aware, throughout. Many of these
10 documents are going to require an individualized privilege
11 review which was not the case in the previous production. So
12 that's -- that's the time estimate.

13 Again, we -- we estimate we could do it in three months if
14 we had an agreed list of custodians and search terms.

15 I -- I -- I have to stress, Your Honor, this is
16 preliminary, in other words, we met on this, we know -- we
17 know the documents, but we have not pulled these. They
18 don't -- there's no set that exists right now. And we would
19 like to do a little more spade work frankly and submit
20 something next week with hard numbers if the Court would --
21 would appreciate that so that we can nail down, you know --
22 these are estimates, the best estimates we have today, but I
23 don't know -- you know, I'd like to do a little more work to
24 make sure we're right on the number of people involved in
25 particular.

1 **MR. EVEN:** So, Your Honor, we don't obviously have
2 visibility into what Apple has and doesn't have. What we do
3 know is that there seems to be, at least as a preliminary
4 issue, this Quip repository that has drafts, meeting notes,
5 and all of those things that I don't know why that should take
6 that long. The emails with the links to that are there, and
7 somebody ought to know what -- where that repository is.

8 I think it needs to be very clear that Apple cannot redact
9 things for confidentiality. We have a protective order in the
10 case, and confidentiality is addressed through that.

11 I think we need some custodial information which Apple has
12 so far refused to provide us saying that the Court has not
13 asked for any metadata and therefore they're not obligated to
14 give that. That's another issue that I haven't even gotten
15 to.

16 But we don't know, for instance, for PowerPoints, drafts,
17 et cetera, who -- who created, who modified, when they were
18 created, when they were modified, because everything was
19 produced as essentially paper documents or PDFs.

20 I think we can at least start there and then meet and
21 confer if there's more that's needed. But those seem like
22 low-hanging fruit that don't need to take four months and that
23 we can start the process and figure out what's going on.

24 **THE COURT:** I'm curious why you didn't ask for
25 discovery prior to a hearing.

1 **MR. EVEN:** Your Honor, we had -- at the time we
2 thought we had enough information into what Apple has done
3 based on the declaration and things of that nature. We -- I
4 think a lot of that came -- came out on cross where we thought
5 it was pretty clear that what Apple has done was insufficient
6 based on the results. And we didn't think that much more was
7 needed.

8 It also wasn't clear to us that Your Honor meant for us to
9 seek discovery on this particular issue, and so that -- that's
10 where we left it.

11 **THE COURT:** You've been handed some notes. Do you
12 want to say anything else?

13 **MR. PERRY:** Your Honor, as to the confidentiality
14 redactions and metadata, we do have an ESI protocol in place.
15 We could, you know, follow that. Much of those issues have
16 been resolved.

17 We have not been -- to be clear, the few documents that
18 have produced during the trial, we've been trying to get them
19 out quickly to the Court and to Epic because we're in the
20 ongoing proceeding. If we're going to shift this into
21 discovery for the first time, you know, we do have a set of
22 protocols in place that would address the technical things
23 that Mr. Even mentioned that the parties already agreed on and
24 Judge Hixson has already ruled on.

25 **MR. EVEN:** Your Honor, with respect, this is the

1 second time now that this is happening that we're learning
2 here that Apple is in fact working on a priv log and now
3 they're suggesting that they'll use the ESI order.

4 We've asked for all that the first time we got the
5 documents immediately. That was last weekend, I believe. We
6 said please provide us -- that was during the Memorial Day
7 weekend -- please provide us the documents. Based on the ESI
8 order that you have agreed to, please provide us with the priv
9 log.

10 I could have had a lot more information. Apple told us
11 we're just not going to do that because we don't think this is
12 your discovery. We think this is the Court, and the Court
13 didn't mention anything about an ESI order or metadata or priv
14 logs or anything of that nature. And we're entitled to redact
15 things for confidentiality other than Northern District rules.
16 I'm not sure which rule that is. It was never cited to me.

17 That -- those are the answers we got. So this is not new
18 news for Apple. They've known about it for at least since I
19 think it's Saturday night when I sent that email.

20 **MR. PERRY:** Your Honor, may I address that, please?

21 **THE COURT:** You may.

22 **MR. PERRY:** We -- you just heard Mr. Even say they
23 sought no discovery before filing this motion. They sought no
24 discovery before proceeding to this hearing. They thought
25 they had enough.

1 The Court has requested documents during the hearing. And
2 Apple has produced them within 24, 36, 72 hours for the Court.
3 And we have produced them in paper copy for the Court. And we
4 have not been following the protocols, as I've told Mr. Even
5 over and over again, because we've been trying to get them
6 done during the hearing. We were trying to finish today, as
7 the Court noted this morning. It takes longer to do things
8 with all the bells and whistles. Right?

9 What I'm hearing the Court request this morning is a more
10 formalized discovery process. I was simply pointing out that
11 that hasn't been done yet, that hasn't been requested by Epic.
12 And that if that is what we are going to embark on, then there
13 are protocols and procedures in place.

14 I was suggesting we don't need to reinvent the wheel. We
15 can go back to the sort of 2021 period, 2020 period where we
16 had these protocols in place for this case and Judge Hixson's
17 rulings on various things that lay the groundwork for doing
18 it. That was my point there.

19 **MR. EVEN:** And our point was simply, Your Honor, that
20 it doesn't take less time to start stamping things
21 confidential and redact them. It doesn't take less time to
22 scrape things from their metadata and produce them at PDF.
23 These things take more time, not less, and Apple took the more
24 time in order to provide a deficient production.

25 **THE COURT:** Obviously we're not finishing today. The

1 question is how much time do you all need to get the documents
2 that will be sufficient to show, which is always the term I
3 used with discovery, I don't need every scrap of paper. The
4 problem is, is that if you are trying to hide something, I
5 don't obviously want people to be able to use wiggle room to
6 hide things.

7 So if there is nothing, if there's no documentation, then
8 it's pretty simple. It sounds like that wasn't the case.
9 Decisions were made, analysis was apparently done. And it's
10 not just -- it's not just the commission that you're seeking.
11 It is all the other restrictions that have been added, that I
12 never authorized, to the protocols that are concerning. All
13 of it is concerning. All of it is concerning.

14 So at this point, it appears as if I need contemporary --
15 contemporaneous documents to indicate and to show me what was
16 actually going on. There are issues of intent that need to be
17 addressed. And documents can frequently circumstantially
18 address that.

19 So we are not done.

20 I need you all to meet and confer and figure out the most
21 efficient way to get me what I need for purposes of this
22 hearing. You can meet today. I can meet with you in the
23 afternoon. You can meet over the weekend. But I need some
24 kind of resolution of this issue. And I need to get you back
25 on my calendar.

1 **MR. EVEN:** Understood.

2 **MR. PERRY:** Understood, Your Honor. May I propose
3 that, with the Court's instruction, if we go back to Apple and
4 the custodians and figure out what the size of the box is, the
5 meet-and-confer would be more useful so that we can discuss
6 custodian names and titles and so forth, you know, which is
7 not information we have in court with us today, but we can
8 have by early next week for a meaningful meet-and-confer with
9 Epic and get back to the Court with a proposal.

10 **MR. EVEN:** We can meet and confer on Monday if -- if
11 that's helpful for them. As I said, we -- our impression
12 based on the documents we already have is that there is a
13 central repository that should answer a lot of these questions
14 where people had all these documents and meeting notes that
15 are low-hanging fruit. But --

16 **THE COURT:** Well, the question is it may be
17 low-hanging fruit, but are we going to continue with the
18 low-hanging fruit, or are we just going to continue once you
19 have what you need? I don't know the answer to that question.

20 Obviously, you know, I got two boxes of documents. And I
21 certainly haven't looked at them. I don't know that you have
22 had a chance. You know, you gave some examples, but I don't
23 know that you've been able to digest them.

24 And, you know, I'm going to leave it to you, as the
25 plaintiff, to make decisions with respect to the record that

1 is in front of me. Because decisions are based on the record.

2 **MR. EVEN:** Understood, Your Honor.

3 **THE COURT:** So in terms of my schedule next week, I
4 think it is fine if we do this by Zoom because it's really
5 just a scheduling issue. Do you all agree? I don't tend to
6 like to do things by Zoom, but scheduling, I think it's an
7 appropriate mechanism or platform.

8 **MR. EVEN:** That would be fine for us, Your Honor.

9 **THE COURT:** All right. Give me one minute.

10 (Pause in the proceedings.)

11 **THE COURT:** Ironically enough, I'm teaching a
12 judges-only session at the 2024 Antitrust Law and Economics
13 Institute for federal judges on Tuesday.

14 **THE CLERK:** Please be seated. Sorry.

15 **THE COURT:** So I can meet with you at the end of the
16 day after -- after I'm at that conference. So I could meet
17 with you on Zoom at 3:30 or 4:00 o'clock. 4:00 o'clock would
18 be easier.

19 Wednesday I'm in jury selection.

20 I could probably meet with you on Thursday, but I won't
21 know that for -- I'm not exactly sure. Thursday or Friday
22 might be an option, but there are still some outstanding
23 issues with the jury that I have to deal with.

24 So we could do Tuesday at 4:00 o'clock.

25 **MR. EVEN:** Tuesday at 4:00 o'clock would work for

1 Epic, Your Honor.

2 **MR. PERRY:** We will make it work, Your Honor.

3 **THE COURT:** Okay. So we'll do it Tuesday at
4 4:00 o'clock on Zoom. And then we'll figure out where we're
5 going to go from there. Okay?

6 **MR. EVEN:** Thank you, Your Honor.

7 **THE COURT:** All right. Safe travels. We're
8 adjourned.

9 **MR. PERRY:** Are we -- sorry, Your Honor. Are we
10 adjourning for the day?

11 **THE COURT:** I think so. We don't have -- we don't
12 have the documents.

13 **MR. PERRY:** May I raise an issue, please?

14 The witnesses who have been testifying are under the
15 Court's admonishment, as -- as the Court will recall. It's
16 been several weeks now for several of them. It's creating
17 hardships at the business. They've been interpreting the
18 order very broadly to not discuss anything related to the
19 App Store commissions, links, and so forth. That is an
20 ongoing part of the App Store that has nothing to do with the
21 proceedings here, but we've been steering very, very wide.

22 We would appreciate some guidance from the Court, because
23 we do have a business to run, that they of course will not
24 discuss the proceedings in this court. But as I said, we've
25 been interpreting it very broadly in the hopes that we would

1 be done, but it's creating a hardship in terms of meetings and
2 decisions and so forth on the ongoing operations of the
3 company.

4 **THE COURT:** I -- I can appreciate that. My concern
5 is, at this point, a historic concern. A decision was made,
6 and all of the testimony relates to that decision and
7 everything leading up to that decision. That is what they are
8 prohibited from discussing.

9 **MR. PERRY:** And, Your Honor, that is absolutely clear
10 and we can accommodate that. It's the ongoing future business
11 operations that we're raising the concern, which we can draw
12 that line, I believe, if that's the Court's direction.

13 **THE COURT:** Mr. Bornstein.

14 **MR. BORNSTEIN:** That's fine, Your Honor. I -- as
15 long as we're doing -- I apologize.

16 As long as we're doing what Your Honor suggested with
17 respect to Mr. Schiller last week, which is whenever there is
18 any doubt as to whether something is within or without the
19 scope of this prohibition, that the folks at Apple err on the
20 side of caution and not discuss the matter at all.

21 **THE COURT:** I'm not going anywhere. If you have a
22 question, let me know, I'll give you an answer. That's our
23 job.

24 Anything else you want to discuss?

25 **MR. BORNSTEIN:** May I raise something, Your Honor?

1 **THE COURT:** You may.

2 **MR. BORNSTEIN:** If Your Honor has the time, we do
3 have two witnesses on our side who we were hoping to have take
4 the stand today. One is a third party, Mr. Simon. And the
5 other is an Epic employee who's come from North Carolina to
6 testify. If Your Honor has the time, we would put them on.
7 If Your Honor would rather reserve, we'll reserve.

8 **THE COURT:** We can do that.

9 **MR. BORNSTEIN:** They obviously don't affect the
10 relevant documents.

11 **THE COURT:** Any objection?

12 **MR. PERRY:** No objection, Your Honor.

13 **THE COURT:** All right. Let's go ahead.

14 **MR. BORNSTEIN:** Thank you very much for the
15 accommodation, Your Honor.

16 In that case, Epic will call Mr. Ben Simon.

17 **THE COURT:** Mr. Doren, just come to the mic.

18 **MR. DOREN:** Thank you, Your Honor. I saw a green
19 light.

20 Mr. Schiller, who will not be back on the stand today, may
21 he come back in as the corporate representative? Or should we
22 send him on his way?

23 **THE COURT:** For these testimonies, he can.

24 **MR. DOREN:** Thank you, Your Honor.

25 **THE CLERK:** Good morning, sir. Please raise your

1 right hand.

3 **BENJAMIN SIMON,**

4 called as a witness by the plaintiff, having been duly sworn,
5 testified as follows:

6 **THE WITNESS:** I do.

7 **THE CLERK:** Thank you. Please be seated and speak
8 clearly into the microphone. Please state your full name and
9 spell out your last name for the record.

10 **THE WITNESS:** Benjamin Simon. My last name is
11 spelled S-I-M-O-N.

12 **THE COURT:** Mr. Simon, good afternoon.

13 **THE WITNESS:** Good afternoon.

14 **THE COURT:** Or morning. Good morning.

15 You may proceed.

16 **MR. BORNSTEIN:** It feels like afternoon, Your Honor,
17 after all that.

18 **DIRECT EXAMINATION**

19 **BY MR. BORNSTEIN:**

20 **Q.** Mr. Simon, have you been here in this courtroom before?

21 **A.** I have. I testified in this trial.

22 **Q.** Okay. And have you submitted a declaration to the Court
23 in connection with these proceedings today?

24 **A.** I did.

25 **Q.** And do you stand by the truth of everything that you put

1 in that declaration to the Court?

2 A. I do.

3 Q. So just do some very quick background, where do you work
4 sorry?

5 A. The company is called Yoga Buddhi Co. We usually use the
6 name Down Dog publicly.

7 Q. What does Down Dog do?

8 A. We make a suite of health and fitness web and mobile apps
9 for doing wellness practices at home. Our most popular home
10 is our yoga app.

11 Q. And what do you do at Down Dog?

12 A. I'm the CEO and president and one of the two cofounders.

13 Q. Before you were at Down Dog, what did you do?

14 A. I was a software engineer at Google.

15 Q. And what sort of educational background do you have in
16 software engineering?

17 A. I have both a bachelor's and a master's from
18 Brown University in computer science.

19 Q. So on which platforms can consumers access the Down Dog
20 app and your content?

21 A. So we have native apps for both iOS and Android. And then
22 we also have a fully functional web version designed to be
23 used in a browser on a laptop or a desktop computer.

24 Q. And how do you all at Down Dog make money?

25 A. We use a subscription model. So when users create an

1 account, they get a free trial period just by signing up.

2 They don't have to give --

3 (Off-the-record discussion.)

4 **THE WITNESS:** When users create an account, we give
5 them a two- to three-week trial period. And then at the end
6 of that period, if they want to continue using our service,
7 they have to sign up for an annual or a monthly subscription.

8 **BY MR. BORNSTEIN:**

9 **Q.** And where can you sign up? On which platforms?

10 **A.** From within the apps, on iOS and Android using in-app
11 purchases or Google Play in-app billing. And on our website,
12 users can use a credit card directly or they can use PayPal.

13 **Q.** What does it cost to subscribe to Down Dog?

14 **A.** Our standard pricing, if you purchase within the app, is
15 \$9.99 per month or \$59.99 per year if they choose the annual
16 option.

17 And then if you purchase on our website, the standard
18 pricing is \$7.99 per month or \$39.99 per year.

19 **Q.** So why is it cheaper? Why do you charge less if somebody
20 signs up on the web versus, say, in the native iOS
21 application?

22 **A.** Primarily that's because we pay much lower processing fees
23 for our credit card and PayPal options on the web.

24 **Q.** And how long has that been the case? How long have you
25 charged less on the web than on iOS?

1 **A.** Since we first implemented the web purchase options, being
2 able to provide a discount was sort of the reason we
3 implemented that in the first place. So at least five or six
4 years.

5 **Q.** Five or six years ago?

6 **A.** At least, yeah.

7 **Q.** So you touched on this a touch just now, but why is it
8 that you do charge -- sorry. Why not charge the same amount
9 on the web and on iOS and just pocket the difference, make
10 more money for Down Dog?

11 **A.** It sort of never made sense from our perspective why we
12 would make more money depending on where the user chooses to
13 pay. We also particularly care about being able to offer our
14 users the lowest possible price. Our product is specifically
15 intended to be a more affordable option versus, for example,
16 practicing at an in-person yoga studio.

17 **Q.** Okay. So let's -- excuse me. Let's talk about the
18 mechanics of payment.

19 For people who sign up on your website, what are their
20 options for how to pay?

21 **A.** So they can enter their credit card information directly
22 or they can log in to PayPal and have PayPal facilitate.

23 **Q.** So if they log in through PayPal, who processes that
24 transaction?

25 **A.** PayPal does.

1 Q. And if they use their credit card information, how does
2 that payment get processed?

3 A. We use a company called Stripe.

4 Q. And what is Stripe?

5 A. They're a payment processor. I believe they do more than
6 just credit card processing at this point, but they're widely
7 used amongst developers.

8 Q. So if a user goes to the website, signs in using a credit
9 card, subscribes using the credit card, and Stripe processes
10 the transaction, what does that cost Down Dog?

11 A. Stripe charges 30 cents flat fee per transaction and then
12 an additional 2.9 percent of the transaction amount. For us,
13 that ends up being in total somewhere between 3-1/2 and
14 6-1/2 percent, given the prices that we're talking about.

15 Q. And what does PayPal charge?

16 A. PayPal is a similar structure but slightly more expensive.
17 It's 2.99 percent and I think 49 cents.

18 THE COURT: Wait, Mr. Simon. You said it ends up
19 being between 3-1/2 and 6-1/2?

20 THE WITNESS: Yeah. Sorry. If you take the
21 30 percent -- or sorry -- the 30-cent constant fee and then if
22 you compute the overall percentage for our prices between \$8
23 and \$40 is what we're doing on our website.

24 So I believe if you do the \$8 times --

25 THE COURT: Got it. No, I get I now. Thank you.

1 **THE WITNESS:** Yeah.

2 **BY MR. BORNSTEIN:**

3 **Q.** So the percentage, the effective percentage varies, in
4 other words, based on how expensive of a subscription the user
5 is purchasing?

6 **A.** Correct. Lower price transactions are going to be --
7 we're going to pay a higher total percentage fee.

8 **THE COURT:** And so because you're talking on top of
9 the mic it's very --

10 **THE WITNESS:** Sorry.

11 **THE COURT:** -- muddled. There's a -- so, that's
12 fine. Let's just see if we can get it without such --

13 **THE WITNESS:** Yeah, I apologize.

14 **THE COURT:** Good ahead.

15 **MR. BORNSTEIN:** Thank you, Your Honor.

16 **Q.** And then I think you answered, but PayPal, what -- what
17 does PayPal charge Down Dog?

18 **A.** It's 2.99 percent and then a 49-cent constant fee.

19 **Q.** And that would translate then into even higher percentages
20 for you?

21 **A.** That's correct.

22 **Q.** All right. So if a user subscribes to Down Dog on their
23 iOS app versus subscribing on the web, is there any difference
24 in terms of where they can then practice their yoga?

25 **A.** There's not.

1 Q. And do people who subscribe on an iOS app get the same
2 content as people who subscribe on the web?

3 A. They do.

4 Q. So do you have any understanding as to why it is that
5 there are subscribers who pay the extra \$2 a month or \$20 a
6 year to subscribe on iOS for the same content?

7 A. I think there are some users who actually prefer to use
8 Apple in-app purchases, but primarily I think users don't know
9 about the cheaper options on our website.

10 Q. And what's your basis for saying that, Mr. Simon?

11 A. We have a lot of data points, but we also have customer
12 feedback directly from customers who voice this explicitly,
13 saying that they purchased in the app and later found out
14 about the cheaper options on the website.

15 Q. Does Down Dog do anything to try to communicate to
16 consumers that the website purchase option is available at a
17 lower price?

18 A. We do email our users.

19 Q. Okay. And what's in the email? What does it say?

20 A. There's a few different emails that contain a link. But,
21 for example, after the free trial period ends, we send them an
22 email, and in that email we have a link to purchase on our
23 website for the 39.99 price.

24 Q. Okay. I want to shift a little bit and talk about Android
25 for a moment.

1 Was there a time that Down Dog ever informed users inside
2 the Android app that there was this website purchase option
3 available for a lower price?

4 **A.** Yes.

5 **Q.** And how long did Down Dog actually have that messaging in
6 the Android app?

7 **A.** Until May of 2022, which is when Google finally enforced
8 that we remove the link to purchase on our website.

9 **Q.** We have a demonstrative to show what some of these screens
10 look like.

11 **MR. BORNSTEIN:** If I could ask Mr. Lion to pulled up
12 CDX-1 and go to Slide 2.

13 (Demonstrative published.)

14 **BY MR. BORNSTEIN:**

15 **Q.** Great. Okay.

16 So do you recognize this image, Mr. Simon?

17 **A.** I do.

18 **Q.** Can you tell us what it is, please?

19 **A.** This is the screen that would appear in our Android app
20 prior to May of 2022, giving the user the option to pay with
21 Google within the app, but it also has the link to pay on our
22 website for a discount.

23 **Q.** Okay. And so can you just explain the two? What are the
24 two bubbles on -- buttons on the bottom there, the blue and
25 the white?

1 **A.** So the blue button which says "pay with Google," if they
2 clicked that, it would start Google's in-app billing flow.
3 And then if they instead clicked the white button:
4 "33 percent off, pay on our website," that would -- that was a
5 link that would open into their browser onto our purchase
6 page.

7 **Q.** Okay.

8 **MR. BORNSTEIN:** So can we go to the next slide,
9 please.

10 (Demonstrative published.)

11 **BY MR. BORNSTEIN:**

12 **Q.** What are we looking at here?

13 **A.** So this is the web page they would land on in their
14 browser if they clicked the white button in the previous
15 screen.

16 **Q.** And when the user landed here on this website screen after
17 pushing that white button, were they logged in to their
18 account already, or did they have to do something to get into
19 the account?

20 **A.** No. We used a URL that was unique to the user so that to
21 ensure that the user would be subscribing for the correct
22 account that they had used within the app.

23 And you can actually see that at the very bottom here.
24 It's a little hard to see, but it says a receipt will be sent
25 to newtestaccount@gmail.com, indicating that was the email

1 address of the account being used.

2 Q. So this was just a test account, but if it were a user, it
3 would say, you know, garybornstein@gmail.com or something like
4 that?

5 A. That is correct.

6 MR. BORNSTEIN: Okay. We can take the demonstrative
7 down.

8 Q. Has Down Dog ever done anything to study the effect that
9 that button in the Android app had on user behavior?

10 A. Yes. In I believe it was 2020, Google clarified their
11 policy making it clear that we would not be allowed to
12 indefinitely have that link. And we wanted to know how that
13 was going to affect our business when that ultimately went
14 into effect.

15 Q. So what did you do?

16 A. So we did what's typically called an A/B test which is
17 essentially an experiment in the app over the course of a
18 month where --

19 THE COURT: And you said A/B or A?

20 THE WITNESS: Sorry. It's like A slash B because you
21 do an experiment with an A group and a B group is the idea.

22 THE COURT: Okay. Thank you.

23 THE WITNESS: So in this case, it was the normal
24 control group of new users who joined the app in that month
25 would see the link as all users did. But then I believe it

1 was a 10 percent -- a random 10 percent of users who joined
2 that month did not see that link in the app. And then after
3 all of that, we looked at the rates of -- of the users
4 subscribing within each experiment group.

5 **BY MR. BORNSTEIN:**

6 **Q.** And so what did the data that you reviewed after this A/B
7 test show you?

8 **A.** So what we saw was that users who saw the link in the app
9 who chose to purchase, 90 percent chose to purchase on our
10 website and 10 percent roughly chose to use Google in-app
11 billing.

12 When the link was removed from the app, that number
13 switched to roughly 50/50 percent. Or half of users
14 subscribing on our website, half subscribing in the app, which
15 is also what we see on iOS where we don't have the link.

16 **Q.** And was there any impact that you detected in the data on
17 overall subscriptions to Down Dog?

18 **A.** Yes. So we also saw that amongst users who created an
19 account, they were 28 percent less likely to subscribe at all
20 whether it was within the app or on our website if they didn't
21 see the link within the app.

22 **Q.** Now, you said Google clarified its policy at some point.
23 Did Down Dog eventually remove the link that we saw on the
24 demonstrative?

25 **A.** Yes. In May of 2022.

1 Q. And what effect did the removal of the link permanently
2 have on user behavior?

3 A. So it's hard to know exactly because we -- we don't have
4 the counterfactual, which is why we ran the experiment, but
5 when we removed the link, we saw the proportion of users
6 purchasing on our website shift to that same 50/50 that we saw
7 in the experiment and also on iOS.

8 We also saw the proportion of purchases that were coming
9 from Android versus iOS fall, which is consistent with a
10 reduction in Android purchases overall.

11 Q. So I'd like to move then to the new guidelines that Apple
12 has issued in connection with what it calls the external
13 purchase link entitlement.

14 Are you familiar with the guidelines at least generally?

15 A. I am.

16 Q. And how is it that you have become familiar with them?

17 A. We been paying close attention to this, eagerly awaiting
18 adding the link to the iOS app when the injunction went into
19 effect.

20 Q. So why have you been paying attention?

21 A. It's an immediate significant boost to our business if we
22 can -- if we can offer this link and the lower price to our
23 users.

24 Q. So has Down Dog admitted an application to be able to
25 offer the link?

1 **A.** We have not.

2 **Q.** Do you plan to do so?

3 **A.** No.

4 **Q.** Why not?

5 **A.** At a high level, there's sort of two reasons. The
6 commission, which isn't just being applied like to all of
7 our -- all of our purchase that happen on our website, but
8 specifically to purchases that come from users clicking this
9 link, is -- it makes this economically disadvantageous to us
10 given the number of users we reach outside of the app and
11 don't pay any commission.

12 On top of that, Apple has added a whole set of
13 restrictions that we think makes it unlikely users would even
14 find or use this link.

15 **Q.** So I want to break down those things. I'll start with the
16 second one, the restrictions that you mentioned.

17 **MR. BORNSTEIN:** And it might be easier to do this
18 with the demonstrative back up. If we could go to Slide 4 of
19 the demonstrative, please.

20 (Demonstrative published.)

21 **MR. BORNSTEIN:** Great.

22 **Q.** So, Mr. Simon, what are we looking at here on this screen?

23 **A.** This is a modified version of the screen we saw in Android
24 as if it was on iOS. So they just switched "Pay with Google"
25 to "Pay with Apple."

1 Q. All right. So to be clear, though, this is not what your
2 screen currently looks like on your iOS app, right?

3 A. Correct.

4 Q. Because you can't have the thing on the bottom, the white
5 button?

6 A. Correct.

7 Q. All right. So let's look at the white button, 33 percent
8 off, pay on our website.

9 Why -- why is it white here? Why was it white on your
10 Android app?

11 A. We're just trying to call out sort of these two buttons as
12 the primary actions to take on this page, that you're choosing
13 between these two -- two options.

14 Q. And would you be permitted to do this, as you understand
15 Apple's current purchase link guidelines?

16 A. No.

17 Q. Would you be permitted to do it if you made the button
18 blue instead of white?

19 A. No.

20 Q. What kind of visual change would you need to make to that
21 button to comply with the guidelines?

22 A. Apple requires that it be -- that it use what they call a
23 plain button style which means that it's just text without any
24 border or background.

25 MR. BORNSTEIN: So can we go to the next slide.

(Demonstrative published.)

BY MR. EVEN:

Q. So what are we looking at on Slide 5 of the demonstrative here?

A. So now that button has just been changed to the plain style, just text.

Q. And as an app designer, what is your view of the effect of this change on user behavior, likely user behavior?

A. It makes it less prominent, I think. I think Apple's own documents say that the plain style is the least prominent of the options. So it's just more likely that the user might not notice that option, might not realize it's something they can actually click on.

Q. And to be clear, this -- does this restriction on button style apply to links that you have to your website for things other than purchases?

A. No.

Q. And are there links that you've had to your website for things other than purchases in the app?

A. Yes.

Q. For example...?

A. We've had a link to the customer support page on our website from the menu in our app. Another example is in May, we did a, what we called a challenge where users could sign up where if they did a practice every day in May, they would be

1 in a raffle to win a free yoga mat.

2 And so we had a sign-up page to set certain preferences
3 around that challenge on our website. And so we would pop up
4 a message in the app with a link announcing that challenge
5 with a link to set those preferences on our website.

6 Q. All right. Well, we'll come back to the pop-ups in a
7 moment. Let me turn back to the -- to the demonstrative.

8 It says on the bottom, 33 percent off, pay on our website.
9 We've gotten rid of the button, but is that text something
10 that you could have on your app under Apple's current
11 guidelines?

12 A. No. We have to use one of, I think it's five templates
13 they've provided.

14 Q. All right.

15 MR. BORNSTEIN: So let's go to the next slide.

16 (Demonstrative published.)

17 BY MR. BORNSTEIN:

18 Q. What are we looking at now here on Slide 6?

19 A. So now the text has been changed to match one of their
20 templates to get 33 percent off, 33 percent off, go to
21 www.downdogapp.com/purchase. And it also has the little icon
22 indicating that this is a linkout which they also require.

23 Q. And like with the button, if this link took the user to
24 something other than a purchase screen on your website, would
25 it be subject to this requirement that it spell out the whole

1 URL?

2 A. No.

3 Q. So focusing just on the link now for a second, do we have
4 it looking the way Apple requires?

5 A. I believe so.

6 Q. Now, I want to talk about the placement of the link.

7 Could you, under the current rules, actually have the link in
8 this spot on the app?

9 A. No.

10 Q. Why not?

11 A. One of the rules is that the link has to be on a single
12 page in the app that the user navigates to that is not part of
13 an in-app purchase flow. So it can't be on this page where we
14 are also doing in-app purchases.

15 Q. So what would you have to do to this page to comply with
16 the guidelines?

17 A. We'd have to remove the link entirely, or I suppose remove
18 the IAP options entirely.

19 Q. So let's go to this next slide.

20 What are we looking at here?

21 (Demonstrative published.)

22 **THE WITNESS:** This now has the link removed.

23 **BY MR. BORNSTEIN:**

24 Q. Okay. And is this what the payment screen looks like on
25 your app today?

1 **A.** Yes.

2 **Q.** So to comply with the purchase link guidelines that exist,
3 you would have to have the exact same screen that you have
4 right now?

5 **A.** Yes. I don't think we can make any change to the in-app
6 purchase screen.

7 **Q.** And from your perspective as a web design -- as an app
8 designer and the CEO of the business, what effect does this
9 rule have, that you can't have the link to your website
10 purchase on the same page as IAP?

11 **A.** I mean, first of all, I think it makes it less likely that
12 the user will ever see the link. This is sort of the exact
13 place where they'd want to make this decision.

14 I think having it in -- on two different pages also would
15 suggest to users that these are somehow unrelated offerings,
16 and so they might think that these -- they're actually buying
17 something different.

18 **Q.** Before we leave this screen, has Down Dog ever had a link
19 to its website for purchase in an iOS app?

20 **A.** There were a couple times when we put the link in just
21 during a sale.

22 **Q.** And when you did that, was that something that was allowed
23 by Apple's guidelines?

24 **A.** It was not.

25 **Q.** So why did you have that button in there when it was not

1 allowed?

2 **A.** At -- at the time, Apple also had a rule that we couldn't
3 communicate this outside of the app, which was a rule they
4 sort of clearly weren't enforcing. So in part, we were
5 testing if they would actually enforce just a temporary link
6 that was only there for three days at a time.

7 But I think it was a mistake. We haven't -- we haven't
8 done that in years.

9 **Q.** So let's move to the pop-ups that you mentioned.

10 Now, so currently in the Down Dog app, where is it that
11 users -- or when is it that users see this screen that allows
12 them to subscribe?

13 **A.** So we show this screen right after they create their
14 account. We pop-up this screen so that they know how long
15 their trial is and what -- what it would cost should they
16 choose to keep using the service.

17 After their trial ends, we also pop up this screen if they
18 reopen the app or try to start a practice.

19 And they also, at any point during their trial, can
20 navigate to the account settings, and there's a button that
21 says "Subscribe to Down Dog" which would also take them to
22 this screen.

23 **Q.** And so of these three options, how do they rank in terms
24 of which ones most of your users actually subscribe through?

25 **A.** By far the most important one is the pop-up we do after

1 their trial is done and they return to the app. I think less
2 than a third of users actually navigate to the menu or --
3 sorry -- navigate to this page themselves.

4 Q. And so would -- would the new external purchase link
5 guidelines from Apple allow Down Dog to have this screen
6 pop-up when the free trial ends?

7 A. Well, this screen is allowed after the free trial ends
8 but --

9 Q. Sure.

10 A. -- the page that had the external purchase link would not.

11 Q. Thank you. That's a good clarification.

12 If you were going to have the external purchase link in
13 your app, would you want it to be on that page that pops up
14 after the end of the free trial?

15 A. Definitely.

16 Q. And to be clear, does Apple prohibit app developers from
17 including links to their website more generally for things
18 other than purchases on a pop-up?

19 A. No.

20 Q. And you mentioned the -- the May trial that you had going
21 on. Was that in a screen that popped up with a link to your
22 website?

23 A. Yes. Very similar to what would happen with this screen
24 after a trial, that was an announcement that as soon as a user
25 opened the app, we would show a pop-up which contained a link

1 to our website.

2 Q. And so to your understanding, does Apple apply this no
3 pop-up rule to any links other than purchase links?

4 A. No.

5 Q. So I want to go to a different subject now. We're going
6 to call for a moment on your training as a software engineer
7 to help explain something.

8 You mentioned that when people signed in -- excuse me --
9 when people hit the button in your Android app to pay on the
10 website, it took them to the website already logged in to --
11 to their account.

12 What's the mechanism that Down Dog used to be able to
13 bring someone to the website automatically logged in?

14 A. So essentially we just need a URL that's unique to the
15 user so that when they arrive in their web browser, we know
16 which user this is. So we would attach, in addition to just
17 downdogapp.com/purchase, we would attach what's called a query
18 parameter, which was a small encrypted token. So it would
19 look like just a random set of text characters to anyone but
20 us.

21 But that would then get sent when they loaded the web page
22 so that, on our servers, we could decrypt that token and know
23 which user this was who was trying to purchase.

24 Q. Under the new Apple external purchase link guidelines,
25 could you do that?

1 **A.** No.

2 **Q.** And what is it in Apple's guidelines specifically that
3 prevents that?

4 **A.** They say that the purchase link has to be for a single
5 statically defined URL.

6 **Q.** All right.

7 **MR. BORNSTEIN:** So can -- can we put up Slide 8 of
8 the demonstrative, please.

9 (Demonstrative published.)

10 **BY MR. BORNSTEIN:**

11 **Q.** So what is it we see here on this left under the word
12 "Static URL"?

13 **A.** This is the log-in page on our website which, if you just
14 visit downdogapp.com/purchase and you've never logged into our
15 website before, this is what you would see.

16 **Q.** Okay. And on the right, we see the screen from before
17 with the person logged in with their email address on the
18 bottom?

19 **A.** Correct.

20 **Q.** Okay. And so what, from your perspective, does the
21 requirement to have a statically defined URL have on the user
22 experience of following a purchase link?

23 **A.** So it would mean that after they clicked the link, they
24 would have to log in here before they can make the purchase.
25 That obviously adds a step of friction. So some users who

1 were on the fence about purchasing are going to decide to --
2 to quit at that point.

3 It also introduces the possibility that users actually log
4 in or create an account with a different email address, which
5 happens more often than you might think, in which case they
6 would purchase for the wrong account, return to their mobile
7 app, not have access, and usually that leads to them reaching
8 out to our customer support.

9 **Q.** So, excuse me, just to be clear, if the user had already
10 been on your website previously and they clicked on the
11 purchase link in your app, would it take them to the log-in
12 page on the left or would it take them already logged in on
13 the right?

14 **A.** We could sort of decide to do it either way. The way we
15 have our -- our website set up, if -- if you had already
16 logged into -- on our website, you would see the screen on the
17 right. But there's no real reason a user would be logged in
18 on our website on their mobile app -- or sorry -- on their
19 phone unless it was to purchase.

20 **Q.** And why is that?

21 **A.** The web version of the actual app is not optimized for a
22 phone dimensions. So we actually show a pop-up saying you
23 should use the native app if you try to access the -- anything
24 sort of but the purchase page or FAQ kind of thing on our
25 website.

1 Q. And to your understanding, are dynamic URLs like this
2 prohibited in the app for links other than purchase links?

3 A. No.

4 Q. Did you use a dynamic link for that May yoga mat
5 challenge?

6 A. Yes, for exactly the same reason, so that when the user
7 arrived on the web page, they would be able to just set their
8 preferences right away and not have to log in to their
9 account.

10 Q. I want to set aside user-facing links that are dynamic
11 URLs. Can you explain, does Down Dog use dynamic URLs for
12 other reasons in the app?

13 A. Yes. In the background, while users are using the app,
14 we're making a ton of -- of Internet requests, mostly to our
15 servers but also to some third parties, for analytics. And
16 all of those are using dynamic URLs with parameters.

17 Q. Can you give some examples of the ways that Down Dog uses
18 dynamic URLs in the app?

19 A. Sure. One example would be for the challenge we've been
20 talking about. Basically when the user opens the app, we
21 would make a request to like downdogapp.com/message with the
22 same kind of token identifying this user so that our server
23 could respond and -- and with the information to display to
24 the user as this pop-up.

25 Q. And is the use -- that sort of use of dynamic URLs

1 permitted by Apple's guidelines?

2 **A.** Absolutely.

3 **Q.** And is this something, this use of dynamic URLs, something
4 that's unique to Down Dog, or is it something that other app
5 developers do?

6 **A.** Any nontrivial app, I mean any app that's connected to the
7 Internet doing anything nontrivial is going to have to use
8 dynamic URLs.

9 **Q.** Can -- can you explain why that is?

10 **A.** Yes. I will try.

11 Essentially if you want to pass any information up to the
12 server, you're going to need to use something other than a
13 predefined URL.

14 So you could create, for example, like a library archive
15 browsing app perhaps without ever using dynamic URLs because
16 you're just going to fetch static content.

17 But as soon as you want to, for example, store data
18 related to a user to sync across devices, that's one of the
19 many, many things you might want to do, you're going to have
20 to make requests that contain information.

21 **Q.** So if there were testimony in this proceeding that the use
22 of dynamic URLs in an app that has user-identifying
23 information of some kind is a serious security risk, what
24 would your reaction to that be?

25 **A.** If dynamic URLs are a security risk, then I think all of

1 iOS is a security risk because the platform gives you every
2 ability to make Internet requests with dynamic URLs.

3 Web browsing also, every web page has dynamic URLs on it.
4 So I think all of the Internet would sort of have to be a
5 security risk for dynamic URLs to be a security risk.

6 Q. Let's set aside the links and the buttons and things for a
7 minute.

8 If Down Dog wanted to include in the app just a simple
9 statement, "Go to our website, subscribe for less," or,
10 "Subscribe for X percent off," without a link, could you do
11 that under Apple's new rules?

12 A. No.

13 Q. Why not?

14 A. There's still a -- there's still a prohibition against
15 calls to actions, links or buttons. They've just added sort
16 of this one exception, but that doesn't change the fact that
17 we can't just write "buy for cheaper on our website,"
18 "30 percent off on our website."

19 Apple takes 30 percent of in-app purchases. You can use a
20 credit card or PayPal on our website. None of that has
21 changed.

22 Q. And if you could, would you want to do something like
23 that?

24 A. Absolutely.

25 Q. In what circumstances?

1 **A.** I mean the link is useful, although making it a static
2 link takes away a lot of that use. So we'd like to be able to
3 include a link. But absent that, I think if -- if we could
4 just say there are cheaper prices on our website or list those
5 prices, many users would go find those themselves.

6 Also it would at least cut out the confusion where users
7 end up mad at us because they feel misled having purchased
8 in -- in the app without knowing about the other options.

9 **Q.** All right. I'm going to go to the last subject which you
10 mentioned first, which is the commission and the pricing.

11 First of all, what's your understanding of what Apple's
12 commission on external purchase links is?

13 **A.** I believe for any purchases made within seven days of the
14 user clicking the purchase link in the app, we would owe Apple
15 27 percent of the transaction amount for anything occurring
16 within the first year and then 12 percent for recurring
17 subscriptions after the first year.

18 **Q.** Okay. And what effect does that have, if any, on
19 Down Dog's interest in pursuing this entitlement for a
20 purchase link?

21 **A.** That alone really takes away any interest.

22 **Q.** Well, what -- what effect would it have, if any, on Down
23 Dog's pricing on its website?

24 **A.** We couldn't -- we've only been able to offer the reduced
25 pricing on our website because we don't pay Apple's

1 commission.

2 So if we had this link, we would need to raise our prices
3 to match those in the app, which would not just affect our iOS
4 users, that would also affect the website prices for all of
5 our Android users and our web-only users.

6 Q. So the 27 percent is obviously not 30. So would you at
7 least save some money by having it be 27?

8 A. No. As I said, we end up paying a little over 3 percent
9 even in the best case for the transactions on our website.

10 Q. And based on the experience that you had with that A/B
11 testing in the Android app, what would you expect to happen to
12 the total number of subscribers that you got if you raised
13 your website prices?

14 A. We would expect it to go down.

15 Q. And what would you expect -- excuse me -- based on your
16 experience with the A/B testing that you did, what would you
17 expect in terms of the number -- let me do that question
18 differently.

19 Let me talk about the people right now who sign up on the
20 web because they got an email from you, for example.

21 Based on your experience with how people use the app,
22 what's your understanding as to how many users would continue
23 to subscribe that way through the email if there were some
24 kind of clearly communicated purchase link available to them
25 inside the app?

1 **A.** I -- I don't know if I know that precisely. Based on the
2 success of the link on Android, I would suspect that -- that
3 most users will see the link in the app before they receive
4 the email and are likely to use that.

5 **Q.** And so what -- what would that mean as an economic matter
6 to Down Dog if people started clicking on the link who might
7 otherwise have subscribed as a result of getting an email out
8 of the app?

9 **A.** We would have to pay Apple commission on those purchases
10 which, as you're pointing out, are purchases that would have
11 occurred on our website otherwise or anyway and we wouldn't
12 have owed a commission.

13 **Q.** So incidentally, do you -- you mentioned the seven days.
14 Do you have data on how much time after clicking on a
15 subscription link in an email from Down Dog people who
16 subscribe actually go through and subscribe?

17 **A.** I do.

18 **Q.** And what does that data show?

19 **A.** So I looked at all of our users who received the email
20 after their trial ended, with the link to purchase on our
21 website between the middle of January and the middle of April.
22 And I looked at the portion of the users who clicked on that
23 link and ultimately did subscribe on our website. And of
24 those users, it was 92-1/2 percent subscribed within -- within
25 an hour. 98-1/2 -- sorry -- 97-1/2 percent subscribed with a

1 day. And 99-1/2 percent subscribed within a week.

2 There were only eight of the 1624 users who took longer
3 than a week. And also I don't think those users were actually
4 acting off of this email at all.

5 **Q.** So taken -- taken as a whole, what effect, if any, does
6 Apple's new commission have on the attractiveness to Down Dog
7 of this external purchase link entitlement?

8 **A.** It makes it worse than not using it at all.

9 **MR. BORNSTEIN:** I have no further questions. Thank
10 you.

11 **THE COURT:** Before we get to cross, given your
12 pricing, though, it doesn't -- the seven-day window doesn't
13 really impact you because you don't have -- it's either a
14 monthly purchase or an annual purchase, it doesn't really
15 matter, right? I mean, do you have --

16 **THE WITNESS:** The user is unlikely to make additional
17 purchases, correct.

18 **THE COURT:** Do you sell anything else?

19 **THE WITNESS:** No.

20 **THE COURT:** So there would be no point in having --
21 unless they decided to buy a second month within the seven
22 days, which is probably unlikely.

23 **THE WITNESS:** Yeah.

24 **THE COURT:** All right.

25 Cross.

1 You may proceed when you're ready, Mr. Lo.

2 MR. LO: Thank you, Your Honor.

3 **CROSS-EXAMINATION**

4 BY MR. LO:

5 Q. Good morning, Mr. Simon.

6 A. Good morning.

7 Q. We have not met. My name is Jason Lo, and I represent
8 Apple.

9 In your testimony and in your declaration, you refer to
10 both your company and your app as Down Dog; is that correct?

11 A. That's correct.

12 Q. I'm going to adopt that terminology, but if at any point
13 it's unclear whether I'm talking about the company or whether
14 I'm talking about the app, feel free to ask me to clarify.

15 A. Okay.

16 Q. And my colleague, Mr. Bedel, is handing you a binder of
17 materials that we may look at through the course of the
18 examination.

19 Sir, this is the third time you've testified in federal
20 court regarding mobile app commissions, correct?

21 A. That's correct.

22 Q. Because in addition to testifying in this case relating to
23 Apple, you testified in December of 2023 in a case that was
24 pending in front of Judge Donato, correct?

25 A. Correct.

1 Q. And you've also been deposed twice in connection with
2 mobile app commissions, correct?

3 A. Correct.

4 Q. And in every instance, you understood that the purpose of
5 your testimony was to try to get Google or Apple to lower or
6 to eliminate their mobile app commissions? You understood
7 that that's why you were being called to testify, correct?

8 A. No, I don't know if that's clear. Removing the
9 anti-steering provisions, I don't think, falls under what you
10 just said and could also have been a reason for me to testify.

11 Q. Okay. Fair enough. Let me rephrase that.

12 You understood that every time you've been called to
13 testify, it was in -- in favor of reducing the amount of
14 effective commissions you end up paying to Apple or to Google,
15 correct? Because the steering would then allow you to get a
16 customer to go to the website as opposed to making a purchase
17 within the app, correct?

18 A. Sure. That's correct.

19 Q. All right. And Down Dog, the company, is a member of the
20 Coalition for App Fairness, correct?

21 A. It's something we signed up for when that launched, like,
22 four years ago. We don't pay them anything. I don't follow
23 what they do anymore.

24 Q. All right. You signed up in September of 2020. Correct?

25 A. That sounds right.

1 Q. And you understand that Epic Games is one of the founders
2 of the coalition, correct?

3 A. That's certainly something I understand now.

4 Q. And you understand that the vision of the coalition is to
5 decrease what it deems to be unfair or unreasonable
6 commissions, correct?

7 A. That sounds correct.

8 Q. All right. You started your testimony with counsel by
9 noting that you stand by the truth of your declaration.

10 Did I catch that correctly?

11 A. Correct.

12 Q. And so it is accurate to the best of your knowledge?

13 A. Correct.

14 Q. It is complete to the best of your knowledge?

15 A. Correct.

16 Q. Did you have any help in writing the declaration?

17 A. There was a back and forth of editing with Epic's lawyers.

18 Q. With Epic's lawyers. All right.

19 And did Epic's lawyers review the declaration before you
20 signed it?

21 A. Yes.

22 Q. All right. You mention in your testimony that Down Dog
23 has not applied for Apple's new external link entitlement,
24 correct?

25 A. Correct.

1 Q. And therefore Down Dog has not released an iOS app that
2 utilizes what is permitted under the new rules, correct?

3 A. Correct.

4 Q. So you haven't tested actual customer responses to an app
5 that complies with Apple's external link entitlement rules,
6 correct?

7 A. Correct.

8 Q. And you have no data about how actual customers would
9 react to an app that complies with the current guidelines,
10 correct?

11 A. We have data about how users react to similar -- to
12 similar --

13 Q. Sir --

14 A. -- treatments.

15 Q. -- do you have data about how actual customers would react
16 to an app that complies with Apple's current guidelines?

17 A. No.

18 Q. Okay. You noted in your direct examination that one of
19 the things that Apple's guidelines requires is that the in-app
20 purchase function and the external link be on separate pages;
21 do you recall that?

22 A. Yes.

23 Q. And I believe your testimony was, well, if that happens,
24 it might lead to user confusion because it suggests that the
25 two options are unrelated offerings, correct?

1 **A.** Correct.

2 **Q.** But you have not shown any actual customers an app with
3 those two purchase functions on separate screens, have you?

4 **A.** Hmm....

5 **Q.** Let me rephrase the question.

6 In your declaration and in your testimony today, you
7 haven't mentioned showing to any actual customers an app in
8 which the in-app purchase and the external link appears on
9 separate pages, correct?

10 **A.** No, that's not something we would ever even think to test.

11 **Q.** I understand. And so therefore you don't have any data
12 from actual customers who have told you, well, wait a minute,
13 when it's on two separate screens, it's confusing, I thought
14 they were two different options.

15 You don't have any customers who have actually experienced
16 that and gave -- given you that feedback, correct?

17 **A.** Not about this specific link, no.

18 **Q.** Okay. Now in your direct examination, you discussed some
19 potential ways to use the external link that does not conform
20 to the current guidelines. These are your mockups on what you
21 would prefer to do, correct?

22 **A.** Correct.

23 **Q.** And I believe that would be CDX-1.4 and CDX-1.5 are
24 examples of that, correct?

25 **A.** I don't have those in front of me anymore so I can't

1 confirm that.

2 Q. Okay. Well, we'll put that in front of you.

3 (Exhibit published.)

4 BY MR. LO:

5 Q. For example, we've got CDX-1.4 up right now, correct?

6 A. No, sorry, my screen is blank.

7 Okay. Now I have it.

8 Q. Thank you. So let me reask the question.

9 CDX-1.4 is a mockup of an app that you would like to do
10 but you believe you are forbidden from doing under Apple's
11 current guidelines, correct?

12 A. Correct.

13 Q. All right. And you have not created a working version of
14 an app that looks like CDX-1.4, correct?

15 A. We have.

16 Q. You have.

17 A. Yes. It hasn't been launched this way. Well, actually,
18 as I mentioned, for a few days during a sale it was.

19 Q. Okay. But -- so you haven't -- you haven't provided the
20 Court with any data about how customers would react to this
21 particular screen, correct?

22 A. Not on iOS, but the equivalent screen on Android we have.

23 Q. Okay. In your direct testimony, you made mention of
24 what's called A/B test. Do you recall that?

25 A. Yes.

1 Q. And A/B test, I believe your terminology means that it's a
2 comparison of one version of the app versus another version of
3 the app. Did I catch that generally correct?

4 A. Yes.

5 Q. All right. So on CDX-1.4 we have one version of the app
6 which I believe your testimony is you would prefer to do,
7 correct?

8 A. Correct.

9 Q. Okay. And you also understand that there -- the Apple
10 guidelines would require you to make your app in a different
11 way that doesn't look like CDX-1.4, correct?

12 A. Correct.

13 Q. All right. And you have not conducted any A/B test to
14 determine how customers would react to something that looks
15 like CDX-1.4 on the one hand versus something that complies
16 with Apple's guidelines as it stands today on the other hand.
17 You have no data comparing actual customer reactions to those
18 two types of apps, correct?

19 A. We do not. I'd be happy to run that experiment and
20 collect that data and report it to this Court if Apple would
21 allow that.

22 Q. Okay, but so you haven't -- but the bottom line is you
23 don't' -- you have not done that, correct?

24 A. Correct. Apple has prohibited it.

25 Q. And you have no data as of now as to how much more or less

1 money Down Dog would make as between those A and B samples,
2 correct?

3 **A.** We do not have that data directly, no.

4 **Q.** Okay. Now, you testified on direct examination that your
5 business is a subscription-based model, right?

6 **A.** Yes.

7 **Q.** All right. Let's take a look at your current sign-in
8 screen, which I believe you had in CDX-1.

9 (Demonstrative published.)

10 **BY MR. LO:**

11 **Q.** On the left-hand side, is that what the sign-in screen
12 looks look on your app?

13 **A.** It's close. This is showing the log-in screen on our
14 website.

15 **Q.** Got it. But does the log-in screen on the app look
16 substantially the same?

17 **A.** Not quite. This actually isn't the first screen they
18 would see. First they'd choose between signing up or logging
19 in. If they choose sign up, they go through an onboarding
20 flow, and then this screen would also tell them something
21 about the free trial they can get if they sign up.

22 **Q.** Okay. So that is actually my -- my -- my -- the point
23 that I want to clarify with you. When a person downloads your
24 app, the first thing that they see is an option to either sign
25 in or to sign up; is that correct?

1 A. Yes.

2 Q. Okay. And it looks similar -- I don't think -- well, let
3 me pause there.

4 In your demonstratives, do you have a screenshot of what
5 that first screen looks like? Because if it is, I'm happy to
6 go to that instead.

7 A. Not that I'm aware of.

8 Q. Okay. But you agree that the one on CDX-1.8 on the
9 left-hand side looks substantially similar to what the user
10 might encounter at first, correct?

11 A. It's not the first screen the user will encounter, but it
12 is part of that flow.

13 Q. Okay. All right. And so as part of that flow, when a
14 user downloads the app for the first time, they necessarily
15 have to go to that screen where they are told to either sign
16 in or sign up, correct?

17 A. Correct.

18 Q. And they can't engage in any of your workouts until they
19 have chosen one of those two options, correct?

20 A. Correct.

21 Q. There's no way to skip to that page and do a couple of
22 workout first, correct?

23 A. Correct.

24 Q. And obviously once the user has either signed in or signed
25 up and then signed in, Down Dog can then customize the app for

1 that particular user based on the log-in information, correct?

2 A. Yes. We use the dynamic URLs that we were discussing
3 earlier.

4 Q. Okay. And so part of the customization once a user signs
5 in is Down Dog can tell the user how much time is left in the
6 free trial, correct?

7 A. Correct.

8 Q. Down Dog can tell the user where did you just leave off,
9 what was your last workout, correct?

10 A. Correct.

11 Q. And Down Dog might actually suggest things based on what
12 the user has already done, correct?

13 A. Correct.

14 Q. And in fact, Down Dog, the app does do all of those to
15 customize the experience once a user decides to sign in,
16 correct?

17 A. Correct.

18 Q. And a user has to sign in in order to use the app,
19 correct?

20 A. Correct.

21 Q. And you know that many other developers also customize
22 their apps once a user has signed in. That -- that's pretty
23 common in the industry, correct?

24 A. Absolutely.

25 Q. All right. Now, to create an account, a user has to

1 provide you with their email address, correct?

2 A. No. They can also use one of these third-party options.

3 Q. Got it, okay. They could use, for example, the Facebook
4 sign-in, the Google sign-in, or the Apple sign-in?

5 A. Correct.

6 Q. If they wanted to create an account with Down Dog, they
7 would provide you with an email address, correct?

8 A. All of those are creating an account with Down Dog. It's
9 just whether they're providing an email address directly or
10 whether they're providing a credential through Apple, Google,
11 or Facebook.

12 Q. And when they provide a credential through Facebook, do
13 you receive the email address as Down Dog?

14 A. We do.

15 Q. Okay. So one way or the other, if the user has signed in
16 or signed up, Down Dog, the company, has access to the user's
17 contact information such as email?

18 A. If they use Apple sign-in, they can choose to hide their
19 email from us.

20 Q. Sure. A user can opt out. But otherwise you would have
21 access to their contact information, correct?

22 A. Yes.

23 Q. Okay. And once Down Dog obtains that email address, it
24 can obviously use that email address to send some offers to
25 the -- to the customer, correct?

1 **A.** Correct.

2 **Q.** And you mentioned on direct examination that in fact Down
3 Dog does do that, correct?

4 **A.** Correct.

5 **Q.** And you understand that under Apple's rules, Down Dog is
6 now permitted to seek other information from customers beyond
7 email addresses?

8 **A.** That sounds correct.

9 **Q.** Okay. For example, if the user chose to provide it and if
10 you asked for it, you could get the user's cell phone number
11 and you could text them, if that was what you wanted to do,
12 correct?

13 **A.** That sounds correct.

14 **Q.** So those communication options are available to you,
15 correct?

16 **A.** From what I'm aware, yes.

17 **Q.** Okay. Now you testified on direct examination that you
18 have an understanding of Apple's external link guidelines,
19 right?

20 **A.** Yes.

21 **Q.** And you understand that as of January 2024, developers do
22 have some options to steer users out of an iOS app, correct?

23 **A.** There is a specific option, yes.

24 **Q.** Okay. And so in your -- one option is in the screen where
25 the user is confronted with either signing in or signing up,

1 Down Dog could use that screen to tell users that they can get
2 special offers on the website. Do you understand that?

3 **A.** I actually think the way the rules are written, it's
4 unclear if it would be allowed on that screen because it says
5 that it has to be on a page that the user navigates to, not a
6 pop-up interstitial or modal, and so I don't really understand
7 how it would be allowed on the first screen that is a pop-up
8 by nature.

9 **Q.** Sure. So let's take a look at tab 3 of your binder which
10 is the Apple guidelines. And that's CDX -- let's go to 3.5.

11 (Demonstrative published.)

12 **BY MR. LO:**

13 **Q.** And there are three screenshots on the top, and we'll zoom
14 into the top left-handmost one. It might be easier to see it
15 on the screen than on paper.

16 You see that one of the templates that Apple provides in
17 its guidelines is the special offers being presented in a page
18 that has "sign in" or "create a new account," correct?

19 **A.** Yes.

20 **Q.** Okay. And but you're saying that in your mind, there is
21 some question in terms of whether you could do that in the
22 specific context of your app?

23 **A.** Yeah. The -- this screenshot doesn't make it clear
24 whether the user navigated to this page. So based on the
25 rules as they're written, I would assume this is not allowed

1 if this is not a page that the user navigates to.

2 Q. Okay. Now, if Apple were to give you the option of
3 putting the special offers on the screen we've been talking
4 about, the sign-in or sign-up screen, is that something Down
5 Dog would want to do?

6 A. Maybe.

7 Q. Okay.

8 A. Almost no users purchase our app before at least
9 completing a practice. So telling them about the purchase
10 option before they've had their trial is not very useful to
11 us.

12 Q. Okay. We'll get to that in a minute.

13 But -- but if Apple allowed you to put it there, would you
14 agree that it would be automatically shown to every user who
15 downloads your app at least once, the special offer?

16 A. Every user who gets to this page, which I'm assuming is a
17 page they have to navigate to. But, yes, it would mean they
18 couldn't create an account without seeing that, I suppose.

19 Q. Right. Well, in your app, let's take away the navigation.
20 In other words, I'm saying let's assume that there isn't a
21 problem with this being what you are concerned about being a
22 pop-up.

23 If you put the special offers on the page where users have
24 the choice of signing in or signing up, then by definition
25 every user who wants to engage with the substance of your app

1 is automatically going to see the special offers at least
2 once, correct?

3 **A.** Yes.

4 **Q.** Okay. And in that circumstance, the user would not have
5 to search for it because before they can do anything
6 substantive with your app, before they can engage in a single
7 workout, they necessarily have to see that special offer,
8 correct?

9 **A.** Well, no. Again, I think they're not likely to want this
10 until after they try the app. And so at that point they're
11 going to have to search for it.

12 **Q.** Well, stick with my question first.

13 The first time that they see it, they're not going to have
14 to search for it. It will be in front of them whether they
15 want to see it or not. Do you agree with that?

16 **A.** When it's in front of them, it will be in front of them
17 and they won't have to search for it, yes.

18 **Q.** Okay. So it would be automatically shown and they would
19 not need to search for it at that particular moment. Would
20 you agree with that?

21 **A.** At that particular moment before they've ever created an
22 account or used our app, yes, that's correct.

23 **Q.** Okay. And on this page, as you know, you can not only
24 include the external link, but you can inform the customer
25 that, by the way, if you go there, you can get things for

1 50 percent off, correct?

2 A. That is one of the specific templates. I don't think we
3 could say, for example, you could use a credit card on our
4 website.

5 Q. I understand. But my question is you could tell the user
6 that they could get the subscription for 15 -- 50 percent off
7 at the website, correct?

8 A. Correct.

9 Q. And you could tell the subscriber or potential subscriber
10 that lower prices are on the web, correct?

11 A. I believe that's one of the templates as well.

12 Q. Okay. And again, I'm not saying you -- whether you want
13 to do it or not, but if Down Dog chose to put the external
14 link on the sign-in or sign-up page, then every user would see
15 that offer at least once when they engage with your app,
16 correct?

17 A. Yes.

18 Q. Okay. And so you would agree that the new rules allow an
19 app such as Down Dog to tell customers from within the app
20 that they can purchase the Down Dog subscription from the Down
21 Dog website at a discount. You agree with that as a general
22 proposition, correct?

23 A. Can you restate that?

24 Q. Sure. Do you agree that the new rules allow an app such
25 as Down Dog to tell customers within the app that they can

1 purchase a Down Dog subscription from the Down Dog website at
2 a discount?

3 **A.** I would say that they disallow it with a single exception.

4 **Q.** Okay. But a single exception means that they do allow --

5 **A.** There is one specific allowance, but it's generally
6 disallowed.

7 **Q.** When -- one word of caution. I'm going to try to let you
8 complete your --

9 **A.** Sorry.

10 (Off-the-record discussion.)

11 **THE COURT:** And only one of you can speak at a time.
12 That's the point.

13 **BY MR. LO:**

14 **Q.** Mr. Simon, yes or no, the new rules allow an app such as
15 Down Dog to tell customers within the app that they can
16 purchase their Down Dog subscription from the Down Dog website
17 at a discount. You agree with that, correct?

18 **A.** Subject to restrictions including a commission which makes
19 it infeasible for us. So the commission prohibits it even if
20 it's allowed in effect.

21 **Q.** Well, the commission means that some developer like
22 yourself may not choose to exercise it. But for developers
23 who choose to exercise it, the new rules permit an app to tell
24 users that they can get a discount outside of the app,
25 correct?

1 **A.** Well, I'm imagining let's say they said we get
2 100 percent, wouldn't that -- that would -- I think that we
3 would all agree that would be an effective prohibition even
4 though it would technically be allowing a link. They can
5 use -- they can use the commission to effectively prohibit it.

6 **Q.** Okay. Do the new rules allow a messaging that tells
7 customers within the app that they can purchase their Down Dog
8 subscription from the website as a discount? Yes or no, or
9 you don't know?

10 **A.** Yes, subject to restrictions.

11 **Q.** Okay. And if significant discounts were offered on the
12 web, the message in the app could tell the users that you
13 could get significant discounts outside of the app as well,
14 correct?

15 **A.** I don't think so we can use the words significant
16 discount, but yes.

17 **Q.** Okay. Well --

18 **THE COURT:** So you can use the word "discount" but
19 not "significant discount"?

20 **THE WITNESS:** I think that's correct.

21 **BY MR. LO:**

22 **Q.** Well, you can tell them that it's 50 percent off, correct?

23 **A.** Correct.

24 **Q.** You can tell them, if it were the case, you could tell
25 them it were 90 percent off, correct?

1 **A.** Correct. I'm just saying we can't use the language that
2 you just chose to use.

3 **Q.** Okay. All right. So but you would agree that the rules
4 don't completely prevent Down Dog from steering users outside
5 of iOS, correct?

6 **A.** They do not completely prevent steering, I would agree
7 with that.

8 **Q.** Okay. Let's talk about payment processing fees.

9 You testified on direct examination that your processing
10 fees are 3.5 percent to 6.5 percent, correct?

11 **A.** That sounds correct, yes.

12 **Q.** And those are the same numbers you included in your
13 declaration, correct?

14 **A.** Yes.

15 **Q.** Both are references to the processing fees you pay to
16 either Stripe or PayPal, correct?

17 **A.** I think specifically those numbers are from Stripe, yes.

18 **Q.** Those numbers are from Stripe. All right.

19 And so anytime a credit card purchase is made for a Down
20 Dog subscription on the website using Stripe, Down Dog pays
21 Stripe up to 6.5 percent of the purchase price.

22 **A.** Correct.

23 **Q.** And anytime a customer purchases a Down Dog subscription
24 on the website, Stripe charges the company no less than a
25 3.5 percent purchase price.

1 A. Correct.

2 Q. Okay. 3.5 percent of the purchase price, correct?

3 A. Correct.

4 Q. Would those numbers be different if the user chose PayPal?

5 A. Yes. They would be higher.

6 Q. They would be higher. Okay. So 3.5 to 6.5 is the Stripe
7 percentage, correct?

8 A. Correct.

9 Q. I take it that for a business such as Down Dog, 3.5 to
10 6.5 percent is a material expense that you, as the CEO,
11 personally keep an eye out.

12 A. Yes.

13 Q. Okay. It's not a tiny percentage that you can just ignore
14 obviously, correct?

15 A. I wouldn't say it's negligible, no.

16 Q. Okay. All right. Now we mentioned earlier that you gave
17 testimony in December of 2023 before Judge Donato. Do you
18 recall that?

19 A. Yes.

20 Q. And when you testified before Judge Donato, that testimony
21 occurred the same way it occurred this morning, meaning you
22 got on the stand and you were asked questions by Epic's
23 lawyers. Do you recall that?

24 A. Yes.

25 Q. Okay. And one of the questions that Epic's lawyers posed

1 to you was: What is your payment processing fee?

2 Do you recall that?

3 **A.** I don't recall it specifically, but I believe that that
4 happened.

5 **Q.** Okay. Do you recall that in answer to Epic's lawyer's
6 questioning, you told Judge Donato under penalty of perjury --

7 **THE COURT:** So you're talking about the jury trial?

8 **MR. LO:** Yes, Your Honor.

9 **THE COURT:** Because you keep saying Judge Donato, but
10 it's a jury trial --

11 **MR. LO:** Fair.

12 (Simultaneous colloquy.)

13 **THE COURT:** -- which is different than a bench trial.

14 **MR. LO:** Fair enough.

15 **Q.** And you testified in the Google case in December of 2023,
16 correct?

17 **A.** Yes.

18 **Q.** And in that case, when Epic's counsel asked you what your
19 payment processing fees were, you told the jury that all in,
20 it was roughly 3 percent, correct?

21 **A.** I could believe that.

22 **Q.** Okay. And in fact, not only did you say that the
23 percentage was all in roughly 3 percent, but you said it was a
24 tiny percentage.

25 Do you recall that?

1 **A.** Yes. Compared to 30 percent, I think 3 percent is a tiny
2 percentage. Also the vast majority of users subscribing on
3 our website are doing so --

4 **Q.** Sir, I'm just asking you if you testified that it was
5 tiny.

6 **A.** If you say so, I believe it.

7 **Q.** Okay. And -- and you did say all in that it was 3 percent
8 when you were testifying in front of the jury as recently as
9 December of 2023, correct?

10 **A.** Can I explain that?

11 **Q.** I'm sure you'll have an opportunity to explain on
12 redirect.

13 **A.** Okay.

14 **Q.** Now, that's not the only time you've testified about your
15 payment processing fees. Because as we talked about earlier,
16 in April of 2021, you testified in a deposition for this case.
17 Do you recall that?

18 **A.** Sounds correct.

19 **Q.** And at that point, your testimony was that your payment
20 processing fees to Stripe and PayPal were 2.7 percent. Does
21 that ring a bell?

22 **A.** I think at the time, that was the amount. But there would
23 have also been a 30 percent, or something, constant fee.

24 **Q.** So when you testified under oath in your deposition that
25 it was 2.7 percent in April of 2021, that number was not

1 entirely accurate, was it?

2 **A.** I suppose. I don't know the exact questioning so I don't
3 know if it would have been clear that I was trying to give an
4 all-in number or giving the percentage number which is
5 obviously the most important.

6 **Q.** Well, let's take a look at that together then. You can
7 see that in tab 8 of your binder. And it's going to be
8 page 75.

9 And I'll start at line 3 and go through line 8. The
10 question doesn't directly relate, but you'll see from your
11 answer why I'm reading it.

12 "Q. You said all fees after Apple's percent; is that what
13 you said?

14 "A. No. Sorry. I'm saying the revenue that we consider
15 is the revenue we receive after any applicable fees including
16 Apple's 30 percent or the 2.7 percent we pay to Stripe and
17 PayPal."

18 Do you see that, sir?

19 **A.** I do.

20 **Q.** Okay. And was that -- and when you gave that testimony,
21 you swore an oath just as you swore an oath this morning,
22 correct?

23 **A.** Yes.

24 **Q.** That oath included the oath to tell the truth, correct?

25 **A.** Correct.

1 Q. The oath also included the oath to tell the whole truth,
2 correct?

3 THE COURT: Mr. Lo, I'm not a juror. I understand
4 how this works. Move on.

5 MR. LO: All right. Thank you, Your Honor.

6 Q. When you gave that prior testimony, both the 2.7 percent
7 and the 3 percent, you understood that you were trying to draw
8 a contrast between Google's fees and the payment processing
9 fees you pay outside, correct?

10 A. Yes.

11 Q. In other words, Google was charging you 30 percent, and if
12 you're paying outside 2.7 percent or 3 percent, then Google's
13 fees seem very high, correct?

14 A. Correct.

15 Q. And so you had an incentive to characterize your payment
16 processing fees in a lower manner if that was consistent with
17 the truth, correct?

18 A. Correct.

19 Q. And you understand that in these proceedings, the
20 incentives are a little bit different, correct?

21 A. Correct.

22 Q. In other words, in these proceedings, it is worse for
23 Apple's position and better for Epic's position if you can
24 characterize your payment processing fees as a little bit
25 higher, correct?

1 A. I think that's probably correct.

2 Q. Okay. And so that's what you've done. You've said that
3 it it's 3.5 to 6.5 percent in this context, correct?

4 A. Correct.

5 Q. All right. Now, you testified earlier that the 3.5 to 6.5
6 is the amount that you pay to Stripe, correct?

7 A. Correct.

8 Q. All right. Is there actually a transaction today in which
9 your effective commission to Stripe is actually 3.5 percent?

10 A. I believe so.

11 Q. You believe so. Well, we'll do the math together. And
12 I've got a colleague with a computer in the background.

13 You testified on direct that on the web there are
14 essentially two purchase options. One of them is 7.99. The
15 other is 39.99 for the year. Correct?

16 A. Correct.

17 Q. Okay. Which of those two transactions did you have in
18 mind when you set the lower bound for Stripe transactions at
19 3.5 percent?

20 A. The 39.99 price.

21 Q. Okay. And the Stripe, as we understand it, is a
22 2.9 percent fee plus 30 cents, correct?

23 A. Correct.

24 Q. All right.

25 I'll represent to you, and I'm sure your counsel will

1 check, that that comes out to 3.65 percent. So it's not
2 3 percent -- 3.5 percent. Do you agree with that?

3 **A.** I could believe that.

4 **Q.** Okay. So, again, are there any transactions today for
5 which you actually pay 3.5 percent to either Stripe or PayPal?

6 **A.** There may be international transactions because the prices
7 end up being slightly differently and the fees are slightly
8 different. But, no, it sounds like you're correct that
9 actually the floor is 3.65 percent in the United States.

10 **Q.** Okay. You didn't have international transactions in mind
11 when you gave the 3.5 to 6.5 range, correct?

12 **A.** I don't believe so.

13 **Q.** Now, then the higher end of your range is 6.5 percent.
14 Are there any actual transactions today in which your company
15 pays a 6.5 percent transaction fee to Stripe?

16 **A.** Again, I believe that would have been calculated using the
17 \$7.99 price.

18 **Q.** Okay. And, again, would it surprise you to learn that
19 that actually is not 6.5 percent?

20 **A.** I could believe that it's slightly different.

21 **Q.** Okay. So how did you get to 3.5 versus 6.5 that you
22 included in your declaration and that you said on direct
23 examination this morning? Where did that number come from?

24 **A.** I believe that I had originally written this as the
25 constant amount plus the percentage fee per transaction, and

1 in one of the revisions of the declaration it got edited to be
2 in terms of a total percentage.

3 Q. Well, but the point is the total percentage even when you
4 add the flat fee does not amount to 3.5 to 6.5 percent. You
5 understand that, right?

6 A. Yes. It sounds like there was a small math error made.

7 Q. Okay. And was that a math error made on your part or on
8 Epic's counsel's part?

9 A. I don't remember.

10 Q. Okay. Well, you signed your declaration on March 12,
11 2024, correct?

12 A. That sounds correct.

13 Q. And after you signed your -- well, let's just skip that
14 part.

15 When you provided your declaration to Epic's lawyers, did
16 any of them ask you why is it 3.5 to 6.5 percent given you
17 just testified that it was 3 percent? Was that question posed
18 to you?

19 A. No. I think I said around 3 percent, and I think
20 3-1/2 percent is around 3 percent.

21 Q. The question is only whether Epic's lawyers posed the
22 question to you as to why it's 3.5 versus 6.5 as opposed to 3?

23 A. They did not.

24 Q. Okay. Did they ask to see your actual payment terms with
25 Stripe or PayPal?

1 A. I don't believe so.

2 Q. Did they ask if you actually paid 3.5 percent on any
3 credit card transactions today?

4 A. I don't remember that being an explicit question.

5 Q. Did they ask if you actually paid 6.5 percent on any
6 credit card transaction today?

7 A. Not that I recall.

8 Q. Did they ask you if in December 2023, you actually paid
9 3 percent on any credit card transaction?

10 A. Sorry. Can you repeat that?

11 Q. Sure. Did they ask you if, in December of 2023, you were
12 actually paying 3 percent all in on any credit card
13 transactions?

14 A. No. Again, we were always discussing the Stripe payment
15 structure. I don't remember exactly how we arrived at -- at
16 the exact 3-1/2 and 6-1/2 percent numbers. It sounds like
17 somewhere in that shuffle a small math error was made.

18 Q. Okay. Was it you or was it Epic's counsel that came up
19 with the 3.5 to 6.5 percent?

20 A. I could believe that it was Epic's -- one of Epic's
21 revisions that changed it from the 2.9 percent plus 30 cents
22 to the 3-1/2 to 6-1/2 percent range.

23 Q. Okay. So Epic's counsel changed it to 3.5 to 6.5. But as
24 you just testified now, Epic's counsel never had a copy of
25 your payment fee structure with Stripe, correct?

1 **A.** They had the previous revision which exactly specified
2 that structure.

3 **Q.** I see.

4 **A.** I should have checked their math, I suppose. It was my
5 sworn declaration.

6 **Q.** All right. Let's move away from payment processing and
7 talk about commissions and their impact on prices.

8 Now one of the things you said earlier was that you
9 wanted to pass along some of the savings to your customers,
10 correct?

11 **A.** Correct.

12 **Q.** Okay. Currently on the iOS app, you've testified to this,
13 a one-year subscription is 59.99. Correct?

14 **A.** Correct.

15 **Q.** And Down Dog makes more than a million dollars a year on
16 the iOS app, correct?

17 **A.** Correct.

18 **Q.** You are not in the Small Business Program, right?

19 **A.** Correct.

20 **Q.** All right. And the way the iOS subscription works is
21 Apple takes a 30 percent commission the first year. And then
22 if somebody keeps subscribing, it goes down to 15 percent,
23 correct?

24 **A.** Those are now the rules. Those were not always the rules.

25 **Q.** Sure. They are the rules today, correct?

1 A. Correct.

2 Q. Okay. And when the Apple subscription commission drops by
3 half in the second year, Down Dog does not pass along that
4 discount to the customers, right?

5 A. No.

6 Q. The price remains 59.99 the second year, correct?

7 A. Correct.

8 Q. How many subscribers --

9 A. I don't think Apple would give us -- sorry, I didn't mean
10 to interrupt. I don't think Apple would give us any mechanism
11 to pass that along when it's billed through Apple.

12 Q. Okay. How many subscribers does Down Dog currently have?

13 A. On order of half a million.

14 Q. And how many of those are past their first year?

15 A. I don't have that number off the top of my head.

16 Let me see if I can bound it.

17 I would -- I would guess it's between 20 and 50 percent
18 are in their first year.

19 Q. Meaning that 50 to 80 percent are past their first year.

20 A. Yeah. 80 percent would be too high. So I would estimate
21 that it's around -- if I was going to give one estimate, I
22 would estimate it's like roughly 40 percent are in their first
23 year and 60 percent are not.

24 Q. Okay. So a slight majority are past their first year,
25 correct?

1 A. Yeah.

2 Q. And I think you answered this earlier, but the reason you
3 don't pass along that 15 percent discount after the first year
4 is because you think that the Apple's rules make that
5 difficult for you to do logistically; is that right?

6 A. Well, I think we'd have to change the price that they're
7 charged in the second year, which I don't think is something
8 we can do. How else would we pass that along?

9 Q. Okay. So it's an Apple restriction that stops you from
10 passing along that discount?

11 A. Specifically in the second year, yes.

12 Q. Okay. Now, you don't have that same problem on Android,
13 correct?

14 A. Well, what do you mean?

15 Q. Sure, let me explain. On the Android platform, Google
16 charges a flat 15 percent commission for both initial
17 subscriptions and for subscriptions past the first year,
18 correct?

19 A. Again, that's now the rule. It was not the rule when we
20 set this pricing.

21 Q. It is now. It has been the rule since January of 2022.
22 Does that sound correct?

23 A. That sounds correct.

24 Q. And before January 2022, as you say, Google was charging
25 30 percent, right?

1 **A.** Correct.

2 **Q.** All right. So since January 2022, Google charges a flat
3 15 percent commission for both initial and subsequent
4 subscriptions, correct?

5 **A.** Correct.

6 **Q.** Now, you still charge 59.99 on the Android platform,
7 right?

8 **A.** Correct.

9 **Q.** All right. And so there's nothing on the Android platform
10 that prohibits you from passing along the discount to your
11 customers. That's a choice you make, correct?

12 **A.** We're planning to revisit our pricing when all of this
13 settles. There's been so many changes to the fees on both
14 Android and iOS that it hasn't felt prudent to change our
15 prices each time there's another change until we think that
16 it's stable.

17 **Q.** So the reason you have not decreased prices on Android
18 from January 2022 to today, May of 2024, is because you're not
19 sure that the prices are stable; is that right?

20 **A.** I mean I think they lost an antitrust trial in that time
21 so I think it's quite possible that the prices aren't stable.

22 **Q.** I'm not questioning your motives. I'm just asking you to
23 confirm that that is the rationale of why you have not changed
24 the prices.

25 **A.** Correct.

1 Q. Okay. Now that rationale is not entirely accurate,
2 though, is it, sir?

3 A. I don't know what you mean.

4 Q. Okay. Well, what I mean is you were deposed in September
5 of 2023 in advance of the Google trial. Do you recall that?

6 A. Yes.

7 Q. And at that deposition, you testified on four separate
8 occasions that the commission that Google charges you was
9 30 percent, not the 15 percent that has been in place since
10 January of 2022. Do you recall that, sir?

11 A. I did. I got confused. Again there have been a lot of
12 changes to these rates over the past few years and multiple
13 platforms.

14 Q. Okay. So in your deposition, when you said four separate
15 times that Google charged you 30 percent, did you actually
16 know that it was 15 percent? Or did you not know as of
17 September of 2023 that Google had lowered its rates? Which
18 one was it?

19 A. I incorrectly answered. I think all four questions were
20 asked back to back. I was mis- -- I had forgotten that that
21 change had happened at the time. It was not an intentional --

22 Q. Okay. So -- so your testimony is you actually knew before
23 September of 2023 that it was 15 percent, but your testimony
24 was just a -- a slip during the testimony; is that right?

25 A. Yes.

1 Q. Okay. So in fact, you did know that it was 15 percent
2 since January of 2022, correct?

3 A. I had at least been aware of that announcement. I don't
4 know if I had been aware of sort of when it went into effect.
5 But, yes, there was a time when I had known that and I was --
6 my recollection was refreshed, I believe, by the lawyer in
7 that deposition.

8 Q. Okay. And so since January 2022, you've known about the
9 discount and you've made the decision not to pass along that
10 discount to your customers, correct?

11 A. We've made the decision not to revisit our pricing yet,
12 correct.

13 Q. Okay.

14 A. We had already discussed changing the pricing once we
15 think that these -- these proceedings are over.

16 Q. Okay. Now, on direct examination, you said that the
17 reason that the web prices are lower is primarily because you
18 deal with lower processing fees. Do you recall that
19 testimony?

20 A. I do.

21 Q. And I think you previously testified that the Google
22 pricing as opposed to the web pricing is really supposed to
23 reflect the revenue that comes to Down Dog because of the
24 commission that Google takes, right?

25 A. That sounds correct.

1 Q. Okay. So let's take a closer look at your revenues from
2 the Google platform, the Apple platform, and the web platform.

3 Currently it's 39.99 for a yearly subscription, correct?

4 A. Correct.

5 Q. And it's 59.99 if somebody wants to subscribe within an
6 app, correct?

7 A. Correct.

8 Q. It's a pretty big difference, \$20 difference, correct?

9 A. Correct.

10 Q. All right. And we talked about your payment processing
11 fees. For the purpose of this, I'm going to take the median
12 of your 3.5 to 6.5. I'm just going to assume it's 5 percent
13 just to make the math a little bit easier. Okay?

14 A. You can. But most users are buying the annual
15 subscription on our website. So the lower end of that range
16 is the vast majority of the time what we're going to pay. But
17 I'm happy to use 5 percent for your questioning.

18 Q. Okay. So let's take a look at tab 13, and we will put
19 that on the screen as well. And I'll walk through this slowly
20 because there's a lot of information here.

21 THE CLERK: Excuse me, counsel. Is the
22 demonstrative --

23 THE COURT: It can be published. There's -- they
24 will let us know if there's a confidential sealed document.

25 And I take -- this has no number on it. So it's just a

1 demonstrative?

2 **MR. LO:** It's just a demonstrative, yes, Your Honor.

3 (Demonstrative published.)

4 **THE COURT:** Go ahead.

5 **BY MR. LO:**

6 **Q.** All right, Mr. Simon. So let's start with the columns.
7 And the first column is just the subscription price. And
8 you'll see that it's 59.99 for the PlayStore or iOS second
9 year, and then it's 39.99 on the web. Do you see that, sir?

10 **A.** I do.

11 **Q.** Then let's move to the second column. And what has
12 changed is that where you are paying a 15 percent commission,
13 we've calculated Down Dog's proceeds, meaning that after
14 Google or Apple takes a 50 percent -- 15 percent commission,
15 you net \$50.99. Do you see that, sir?

16 **A.** I do.

17 **Q.** All right. Now on the web, you're not subject to a
18 15 percent commission, correct?

19 **A.** Correct.

20 **Q.** Okay. So what we did in the last column is we counted the
21 5 percent payment processing fees. So 39.99 minus a 5 percent
22 payment processing fee nets you 37.99. Do you see that?

23 **A.** I do.

24 **Q.** And so if you look at the last column, you can see how
25 much you net when you pay a 15 percent commission versus how

1 much you net when somebody subscribes on the web. So it's
2 \$50.99 versus \$37.99. Do you see that, sir?

3 **A.** I do.

4 **Q.** So in fact, whenever somebody subscribes on the Google
5 Play Store, they're paying more, but you end up pocketing \$13
6 more when they do that than when someone subscribes on the
7 web, correct?

8 **A.** Correct. Again, we set this pricing when the commission
9 rates were 30 percent.

10 **Q.** Okay. And in the over two years in which Google has
11 lowered its prices, you've decided just to hold on to those
12 prices, correct?

13 **A.** Yeah, perhaps naively we thought it wouldn't take two
14 years.

15 **Q.** All right. Now, have you calculated -- let me back up.
16 Obviously Down Dog sets the prices on the web, correct?

17 **A.** Yes.

18 **Q.** Down Dog also sets the prices in its native apps, meaning
19 the Android apps and the iOS apps, right?

20 **A.** Correct.

21 **Q.** You set the prices in both places?

22 **A.** Correct.

23 **Q.** You could set them as high as you want in one place and as
24 low as you want in another place, you know, whether it makes
25 economic sense or not, that's all up to you, correct?

1 A. Correct.

2 Q. Okay. Have you calculated what the prices could be within
3 the native app if you decided to pass along the discount to
4 your customers?

5 A. I don't think I understand the question.

6 Q. Sure.

7 A. Why would there be a discount in the native app?

8 Q. Exactly. If you wanted to pass along the discount in the
9 native app to the customers instead of taking \$13 more every
10 time somebody subscribes in the native app, have you
11 calculated what the price to the end consumer would be? It
12 wouldn't be 59.99, in other words.

13 A. We've -- we've loosely discussed lowering the in-app price
14 from 59.99 to 49.99 to reflect a better sort of overall
15 difference in commission, which would be a 20 percent
16 reduction to accommodate for the 15-plus, sometimes 30. But
17 that's not something that's ever been stated publicly. It's
18 just discussions with my cofounder.

19 Q. So internally you have described -- you have discussed
20 lowering the price from 59.99 to 49.99; is that right?

21 A. Correct.

22 Q. Would it surprise you to learn that even at 49.99, you
23 would end up making more money on the Google platform than on
24 a web subscription?

25 A. No, it wouldn't. It's designed to be a 20 percent

1 reduction, and Android's is only 15 percent.

2 Q. Okay. So let's take a look at tab 15 because we've done
3 the calculation for you.

4 (Demonstrative published.)

5 BY MR. LO:

6 Q. So there's a little bit of algebra that went into this
7 which is beyond my means to explain, but suffice to say that
8 if you get to 44.69 for your native app subscription, that
9 nets you roughly the same amount as a web subscription. So
10 let me go through the math with you.

11 Same thing in terms of what these columns mean. Let's
12 assume for the moment that you charge your PlayStore customers
13 and iOS second years 44.69. You with me there?

14 A. Sure.

15 Q. So at that point, the price difference is only roughly \$5
16 and not \$20 between the native app and the web subscriptions,
17 correct?

18 A. Yes.

19 Q. And if we apply a 15 percent commission to 44.69, that
20 would net you 37.98. Do you see that, sir?

21 A. I do.

22 Q. Okay. And then again on the web subscription, you're just
23 subject to the 5 percent, and so you net 37.99. Do you see
24 that, sir?

25 A. Yes.

1 Q. Okay. And so it's 1 cent difference so it's not exactly
2 identical. But the bottom line is you could lower your native
3 app prices in Android and for second year iOS by \$15 and then
4 end up in the same place revenue-wise as if someone subscribed
5 on the web. You understand that?

6 A. If we're just talking about Android and using the
7 5 percent in this context is a little weird because we're
8 talking specifically about the 39.99 price. But subject to
9 those caveats, yes, correct.

10 Q. Okay. Now on direct examination, counsel for Epic asked
11 you if you raised the prices on the web, would you -- what
12 would you expect to see in terms of the mix of web versus
13 native app subscriptions. Do you remember that question?

14 A. I don't remember that exact question.

15 Q. Let me -- let me just ask the question brand-new then.

16 If you had to raise your web prices and kept your iOS
17 prices or your Android prices the same, would you expect there
18 to be a shift in terms of the amount of people who subscribe
19 on the web versus those who subscribe using an in-app purchase
20 mechanism?

21 A. Yes.

22 Q. And which way would that shift be?

23 A. I would expect more users to subscribe in the app if the
24 web prices were higher and closer to those in the app.

25 Q. Okay. Now let's take the flip side of that. Let's assume

1 that your web prices stayed the same, 39.99, but you lowered
2 your native app subscription prices from 59.99 to 44.69.

3 Which way would you expect the shift to be in terms of how
4 customers choose to subscribe?

5 **A.** I would expect more customers to subscribe in the native
6 app.

7 **Q.** Okay. So if you had passed along these commissions
8 savings, you would expect that there would be more than
9 50 percent of people who choose to subscribe using the native
10 app, correct?

11 **A.** Yes.

12 **Q.** Okay. We discussed earlier that you were a member of the
13 Coalition for App Fairness. You recall that, sir?

14 **A.** Yes.

15 **Q.** Have you told any other developers that they should try to
16 keep their mobile prices high relative to what they charge on
17 the web?

18 **A.** Not that I recall.

19 **Q.** Okay. So if you were subpoenaed for texts and emails,
20 there would be no such communications between you and other
21 coalition members?

22 **A.** I only can think of one developer that I've talked to
23 about this. I'm not even sure they're part of the coalition.

24 **Q.** Okay. Has anyone involved with the coalition suggested to
25 you that you should keep your mobile prices high relative to

1 your web prices?

2 A. Not that I recall, no.

3 Q. Okay. So that decision was made purely by you internally?

4 A. Yes.

5 Q. All right. By the way, have you had discussions with
6 other developers about the external link entitlement at all?

7 A. I don't think so.

8 Q. Have you told anybody not to apply for the external link
9 entitlement?

10 A. No.

11 Q. Has anybody told you that?

12 A. No.

13 Q. Okay. So, again, no texts or emails about that subject?

14 A. No.

15 Q. And have you been preserving your texts and emails?

16 A. Yes.

17 Q. Okay. You would agree that the overwhelming majority of
18 your subscribers consume Down Dog's content using a native
19 app, correct?

20 A. Yes.

21 Q. Okay. It's nearly a hundred percent; is that right?

22 A. No.

23 Q. What percentage would you put it at?

24 A. It's about 10 -- or about 90 percent use a mobile app
25 primarily.

1 Q. Okay. Now you did mention on direct examination that
2 Down Dog's content also is accessible through a web browser,
3 correct?

4 A. Correct.

5 Q. They can access that content from a desktop computer using
6 a browser, correct?

7 A. Correct.

8 Q. Now, you did mention that on a mobile phone, it's possible
9 to access the Down Dog content using a browser, correct?

10 A. You can access our website. You can't really access the
11 content itself.

12 Q. Right. So you haven't -- Down Dog, the company, hasn't
13 really put in the effort to make that content easily
14 consumable using a browser on a mobile phone, correct?

15 A. Correct.

16 Q. Your development efforts have been to improve the native
17 app experience for your customers, correct?

18 A. With respect to mobile, yes, correct.

19 Q. Right. Because you know that the majority of your users,
20 90 percent, prefer to consume the content within the native
21 app, correct?

22 A. That's not really the only reason. It's more we want --
23 we want our customers to have access on all of their devices
24 and we'd rather not put in effort to create an additional way
25 to access it on their mobile phones if we think that the

1 native app is sufficient, which we do.

2 Q. Okay. But you have made a business decision to focus your
3 development efforts for mobile users to use the native app as
4 opposed to accessing the content through a web browser,
5 correct?

6 A. Correct.

7 Q. And in providing the native app experience, Down Dog
8 benefits and uses Apple's technology when it's on the iOS
9 platform, correct?

10 A. Correct.

11 Q. And when it's on the Android platform, when it's providing
12 native app experience Down Dog is utilizing Google's
13 technology and services to provide that experience, correct?

14 A. Correct.

15 Q. So Down Dog benefits from being a developer for a native
16 app, correct?

17 A. Correct.

18 Q. And -- and you know that the customers like consuming
19 their content in the native app, correct?

20 A. Correct.

21 Q. Now, even though 90 percent of your subscribers consume
22 their content within a native app, whether its Android or iOS,
23 far short of 90 percent of them actually result in a
24 commission payment to Apple or Google, correct?

25 A. Correct.

1 Q. In fact, you testified on direct examination that right
2 now only about 50 percent of your users actually subscribe in
3 a way that results in a commission to Apple or Google,
4 correct?

5 A. Correct.

6 Q. So what you are seeking, sir, is not a commission
7 structure that is proportionate to whether your users are
8 using the native app experience or the web experience. That's
9 not what you want, correct?

10 A. Can you repeat the question?

11 Q. Sure. You're not looking for a commission structure that
12 would be proportionate to usage of the native app as opposed
13 to the web app. And let me -- opposed a web browser. And let
14 me clarify what that means.

15 If there was a commission structure that if a user
16 consumes most of their content in the native app, you pay a
17 commission regardless of whether they signed up for the
18 subscription, but if they consume most of your content on a
19 website, you don't pay a commission regardless of whether they
20 signed up for the subscription or not; do you understand what
21 I'm saying so far?

22 A. I do.

23 Q. You wouldn't want that structure, would you?

24 A. I -- I don't think I've testified anything about that kind
25 of structure. I think if it was that kind of structure, we

1 would have to decide do we want to be on iOS at all or just do
2 mobile web.

3 Yeah.

4 **Q.** Okay. Right. Because what you really want is a business
5 result where 90 percent of your users continue to consume the
6 content within a native app, but you pay essentially no
7 commission to either Google or Apple for any of those users,
8 correct? That's what would prefer.

9 **A.** No. I'd prefer that Apple lower their commission rates.
10 And then I expect that they would get a lot of -- they would
11 get a lot of the users purchasing within the app and they
12 would get a commission.

13 **Q.** Okay.

14 **A.** It would be lower than 30 percent.

15 **THE COURT:** Somebody has a phone on, and it needs to
16 be off or you need to leave the room.

17 Are you moving to a new topic?

18 **MR. LO:** I am, yes.

19 **THE COURT:** All right. I have a meeting in five
20 minutes. So we're going to go ahead and take a recess until
21 1:30.

22 **MR. LO:** Thank you, Your Honor.

23 **THE COURT:** You are instructed not to have any
24 discussion with any lawyer or anyone with respect to this
25 examination. You're still on cross.

1 We'll stand in recess. Thank you.

2 **THE CLERK:** Court is in recess.

3 (Recess taken at 11:55 A.M.; proceedings resumed at
4 1:57 P.M.)

5 **THE COURT:** Okay. You may be seated.

6 All right. The record will reflect that the parties are
7 present. The witness is on the stand.

8 You may proceed.

9 **MR. LO:** Thank you, Your Honor.

10 **Q.** Welcome back, Mr. Simon.

11 **A.** Thank you.

12 **Q.** A couple of follow-up questions from this morning's
13 session.

14 First, you testified on cross-examination that you may
15 have had one discussion with another developer. I think it
16 was either about the prices or the entitlement. Do you recall
17 that discussion?

18 **A.** No, sorry, that was years ago before this trial even
19 happened is the discussion I was referring to.

20 **Q.** Okay.

21 **A.** I haven't had any discussions with developers about the
22 entitlement or since that time.

23 **Q.** Okay. And the one that you did recall, who was that with?

24 **A.** DHH is his Twitter handle. It's David something Hansson,
25 it's another H. But he's been a sort of vocal critic of

1 Apple's policies.

2 They, around the time that this trial started, had a new
3 app, HEY, that was an email client that Apple was requiring
4 them to add in-app purchases to. And so I sent him an email
5 at some point when I think it was because Google started
6 enforcing similar policies, and we had a brief exchange.

7 Q. That was in the 2021 time frame?

8 A. I think 2020.

9 Q. Okay. And other than a couple of emails, any other
10 communications with Mr. Hansson?

11 A. No.

12 Q. When we discussed the Google pricing and Google lowering
13 its commission to 15 percent, you said -- one of the things
14 you said was you wanted to see if things stabilized. Do you
15 recall generally that discussion?

16 A. I do.

17 Q. Okay. And one of the things you worked in was that Google
18 was just found to be a monopolist; do you recall that?

19 A. I do.

20 Q. So when you say that you were waiting for things to
21 stabilize, is it your expectation that, if anything, the
22 Google commission is going to get further decreased or
23 eliminated?

24 A. Yeah, I guess that would be my expectation.

25 Q. Right. In other words, you're not really expecting that

1 somehow as a result of the lawsuit and other factors, somehow
2 you're going to end up paying more than 15 percent to Google
3 that you do currently, correct?

4 **A.** That's not my expectation, no.

5 **Q.** Okay. So when you say that you're waiting for the Google
6 situation to stabilize, the only thing that the stabilize --
7 stabilization might do is result in the commissions going even
8 lower which would mean that your profits go even higher,
9 correct? That's the direction that you would expect the
10 commission and your profits to go, correct?

11 **A.** That's correct.

12 **Q.** Okay. So in the meantime, you're not concerned that if
13 you give a discount to your customers, that somehow you will
14 lose money because of that. The only question is are you
15 going to make even more money going forward if Google's
16 commissions are subject to elimination or further changes,
17 correct?

18 **A.** The concern is that if we change our prices too
19 frequently, it's confusing to users. So I agree with your --
20 with what you're saying that we could lower them now and the
21 expectation is we would only lower them further. But if we're
22 going to lower them further, we would prefer not to lower them
23 at all and change our prices when it's finally a time to
24 change our prices and we can keep them that way for years.

25 **Q.** And in your mind, that pricing strategy is really for the

1 benefit of your users so that you don't confuse them; is that
2 correct?

3 **A.** There are costs to us as well of changing prices. It
4 takes developer effort to implement new prices. So it would
5 be work on our part. And I also think it's confusing to
6 users.

7 **Q.** You testified earlier that you have roughly half a million
8 subscribers, correct?

9 **A.** Correct.

10 **Q.** And roughly half of them use the Android platform?

11 **A.** Yeah, like 40 percent.

12 **Q.** Okay. So roughly 200,000 to 250,000 of those subscribers
13 are Android users, correct?

14 **A.** I believe that's correct.

15 **Q.** All right. So we went through the math earlier. Every
16 time somebody subscribes on Android currently, Down Dog is
17 making \$13 more on that subscription than if the user had
18 subscribed using the website. Do you recall that?

19 **A.** Yeah, I don't know that those numbers are exactly correct,
20 because you used a 5 percent number which is incorrect. But,
21 yes.

22 **Q.** Okay. Using those numbers, \$13 multiplied by the number
23 of Google subscribers you have, you're making approximately
24 \$3 million a year more by not changing the prices currently
25 and waiting for things to stabilize, correct?

1 **A.** I wouldn't agree with that statement. Any -- any
2 direction that we change our prices, whether it's higher or
3 lower, also changes the number of users who subscribe. So if
4 we raise those prices, I would expect fewer total
5 subscriptions, or vice versa. Sorry, I'm getting confused.
6 Can you repeat your question?

7 **Q.** Sure.

8 **A.** My apologies.

9 **Q.** Under the current system, by not changing the prices
10 you're making \$13 more per subscriber who comes in on Google
11 Play as opposed to who comes in on the web, correct?

12 **A.** Yes. I don't think -- again, I don't think the \$13 number
13 is exactly correct. But that is vaguely correct, what you're
14 saying.

15 **Q.** But the amount extra you are making on the Google platform
16 today by not passing on the commissions is roughly on the
17 scale of about \$3 million per year.

18 **A.** I haven't done that math. I will trust you on it.

19 **Q.** Earlier this morning I asked you about the ability for
20 your app to customize options once a user logs in. Do you
21 recall that --

22 **A.** Do.

23 **Q.** -- testimony?

24 And one of the things you said was, well, we used to do
25 the customization through the dynamic URLs. Do you recall

1 that testimony?

2 **A.** We still do.

3 **Q.** And I think what you mean by that is that when somebody
4 goes to the website, you use a dynamic URL to log that person
5 into the website and therefore customize things for that user;
6 is that correct?

7 **A.** That's not what I was referring to.

8 **Q.** Then what were you referring to when you said you used the
9 dynamic URLs to customize?

10 **A.** I was referring to the fact that from within the iOS app,
11 without the user leaving to a browser, we make many internet
12 requests back to our servers in the background using dynamic
13 URLs, as almost every app in the App Store must.

14 **Q.** Okay. And in terms of a user who wants to click out,
15 either using your old Google -- the old version of your Google
16 app or if you were to use an entitlement, you agree that it
17 would still be possible to customize the web experience using
18 a static URL, correct? It's possible.

19 **A.** It's not possible to customize what they will see
20 immediately upon visiting that URL. If they log in, then of
21 course at that point we can customize.

22 **Q.** Sure. Well, let's take it one step at a time.

23 Number one, if they click out on the link and they are
24 already logged in, then it is customized right off the bat,
25 correct?

1 **A.** We could choose to implement it that way, correct.

2 **Q.** Okay. And if they are not logged in, once they log in on
3 the website, you can customize that experience as well,
4 correct?

5 **A.** Correct.

6 **Q.** Okay. And the reality, though, is that you don't really
7 need to customize the experience for users who go from the app
8 to the web, correct? Because we discussed earlier the
9 majority of them go to the web simply to purchase a
10 subscription after which they come straight back to the app
11 and continue to use the native app. That's the majority of
12 your users' experience in terms of clicking out to the web,
13 correct?

14 **A.** I don't think I understand how the first part of that was
15 related to the second part. Can you repeat it?

16 **Q.** Sure. The majority of users -- let's back up.

17 When you had the link built into your Google app, you
18 understood that the majority of users who clicked on that link
19 to go out to an external website did so only for the purpose
20 of making a subscription purchase, correct?

21 **A.** Correct.

22 **Q.** In other words, they were not clicking out on that link
23 and then intending to consume your content outside of the app.

24 **A.** I don't think that was their intent primarily, no.

25 **Q.** Right. And so the customization for those particular

1 users, would you agree, is not particularly important?

2 A. No, I don't agree with that.

3 Q. Well, you agree -- you believe that you want them to be
4 able to log in so that they are making the purchase for the
5 right account, correct?

6 A. That I agree with.

7 Q. Okay. But once they have logged in, they just need to
8 make a subscription purchase and then they're right back into
9 the app. That is the behavior of the majority of your native
10 app users, correct?

11 A. Yes.

12 Q. Okay.

13 Now, let's talk about the log-in issue.

14 On direct examination, you said that the log-in adds a
15 step of friction and that people enter the wrong email address
16 more often than you would think.

17 Do you recall that testimony?

18 A. I do.

19 Q. All right. You haven't provided the Court with any data
20 as to how many of your 500,000 users actually have more than
21 one account, have you?

22 A. I have not provided that data, no.

23 Q. Okay. And Down Dog offers customers support for its
24 customers, correct?

25 A. We do.

1 Q. And I assume you believe that Down Dog's customer support
2 is timely.

3 A. I think there are periods when we haven't been good at it,
4 but, yes, I would generally say that we have timely customer
5 support.

6 Q. You strive to provide timely customer support.

7 A. Yes.

8 Q. You strive to provide responsive customer support.

9 A. Of course.

10 Q. So if a user actually had two accounts and purchased it
11 for the wrong account, that's something you would try to
12 resolve very quickly for that user, right?

13 A. Yes. That's actually the most common sort of serious
14 customer support issue that we face.

15 Q. Right. And indeed you would have a financial incentive to
16 quickly resolve that issue for the customer because especially
17 if that customer is going to be a second-year subscriber, if
18 you can resolve it and put them back into the same account,
19 that's going to save you 15 percent on commission for an iOS
20 user, correct?

21 A. Sorry. Can you say that again?

22 Q. Sure. You have -- Down Dog has a financial incentive to
23 resolve a situation where a customer buys a subscription for
24 the wrong account. Would you agree with that?

25 A. Yes.

1 Q. Because if they had one account that they did for the
2 first year and then somehow they did a second subscription,
3 then you might not get the benefit of the 15 percent
4 commission rate for the second year?

5 A. No. We're talking about website purchases. We're talking
6 about a user purchasing on our website with the wrong account.

7 Q. Ah. Fair enough. Okay. But even in that situation, you
8 would have a financial incentive to get them sorted out really
9 quickly, right?

10 A. Yes. I can tell you that users find this process very
11 frustrating.

12 Q. Okay. But you've provided no historical data in your
13 declaration as to how often this has historically happened,
14 correct?

15 A. No. I can testify to seeing at least 300 cases of these
16 customer support messages myself.

17 Q. Okay, 300 out of 500,000 users.

18 A. Out of -- out of many. I don't do all of our customer
19 support, obviously.

20 Q. Okay. On direct examination, you gave a statistic, I
21 think it was a 99.5 percent statistic relating to emails that
22 you send to people in their free trial period. Do you recall
23 that testimony?

24 A. Yes. It was actually an email they receive at the end of
25 their free trial period.

1 Q. Ah. Okay. And did I get the 99.5 percent number right?

2 A. Yes.

3 Q. And what -- tell me again what the 99.5 percent number
4 represents.

5 A. So this was there were 1624 users who clicked on the link
6 in that email and eventually made a purchase on our website.
7 And of those 1624, only eight made that purchase more than
8 seven days after they clicked the link in the email.

9 Q. Okay. So let me just make sure I understand the facts.

10 THE COURT: Why? Why do we have to repeat testimony?

11 MR. LO: Your Honor, I'm actually going to get to a
12 different point, but I want to understand what this number
13 stands for. I --

14 THE COURT: Okay.

15 MR. LO: I have no more than two more questions on
16 this, Your Honor.

17 THE COURT: Because now I'm hearing it the third
18 time.

19 MR. LO: I understand, Your Honor.

20 Q. The 1624, there were more people who clicked on it than
21 the 1624, right? In other words, the 1624 are the ones who
22 clicked and then also made a purchase.

23 A. Correct.

24 Q. So there were people who clicked and then didn't make that
25 purchase.

1 A. Correct.

2 Q. Okay. And this is an email that you sent near the
3 expiration of the two- to three-week trial period, correct?

4 A. Immediately after the expiration, correct.

5 Q. Okay. But you understand that that is not the time window
6 that is at issue in this case, don't you?

7 A. Well, as I think I testified to, most of our users
8 subscribe after their free trial is done. So it is the time
9 period when I would expect this link in the app to be used.

10 Q. Well, let's go to your demonstratives, then. And let's go
11 back to the Google example. And so that's your CDX-1.2.

12 (Demonstrative published.)

13 BY MR. LO:

14 Q. You testified on direct examination that this is what your
15 app looked like when you had the external linkout on Android,
16 correct?

17 A. Yes.

18 Q. Okay. Did you track at that time how quickly people
19 clicked on the 33 percent off from the time they downloaded
20 the app?

21 A. No.

22 Q. Okay. Did you track -- well, let's go through your --
23 your subscription model. When somebody signs on to your app,
24 they get a two- to three-week trial period, correct?

25 A. Correct.

1 Q. And in fact, most of the users don't subscribe during that
2 to two- to three-week trial period. You would agree with me
3 on that?

4 A. Correct.

5 Q. Because you, Down Dog, actually encourage people don't
6 sign up right away, take advantage of the two- to three-week
7 free trial period, and then just sign up afterwards. You
8 actually have that on your website, correct?

9 A. I'm not sure what you're referring to on our website.

10 Q. Okay. Let's take a look at tab 25.

11 (Demonstrative published.)

12 BY MR. LO:

13 Q. Page 23. This is the FAQs from the Down Dog website.

14 Are you with me?

15 A. Yes.

16 Q. All right. And the question -- the frequently asked
17 question that is posed on your website is: "Can I delay my
18 subscription start date? Answer: No. Subscriptions start as
19 soon as you purchase. If you are in a free trial period, you
20 may want to wait until the trial is over to purchase.

21 However, if we are running a special sale, this may mean
22 missing out on the best price. We know this can make it a
23 hard decision."

24 Do you see that, sir?

25 A. I do.

1 Q. Okay. So in the absence of a sale, Down Dog encourages
2 its users don't make the purchase right away, correct? Wait
3 until your free trial is over.

4 A. The reason we have this is we get customer support of
5 people asking this specific question wanting to make sure that
6 they can wait until their free trial is over and then
7 purchase. So we're acknowledging that of course users may
8 want to do that.

9 Q. Okay. Would you agree with me that your FAQ site suggests
10 to users that they wait until after the two- to three-week
11 trial period is over?

12 A. The exact language is you may want to wait. I don't think
13 that's actively suggesting that they do so.

14 Q. Okay. Now going back to CDX-1.2, would you agree that for
15 many users, when they first download your app, even though
16 they are in a two- to three-week trial period, at least some
17 of them are going to click through to the website first just
18 to see what the prices are going to be afterwards? That's a
19 reasonable behavior you would expect from your customers,
20 correct?

21 A. It's possible.

22 Q. Right. Because many people, even in a free trial, will
23 know that if at the end of the free trial, it's something
24 super expensive, a thousand dollars a month, then they're not
25 going to go through with the free trial at all. So they're

1 going to take a peek at the pricing. You expect that type of
2 behavior, correct?

3 **A.** I wouldn't expect it because we've already labeled that
4 it's 33 percent off. So I don't think they need to visit our
5 website to know what the pricing is on our website. Surely
6 some users are going to do that. I would not expect users to
7 do that.

8 **Q.** Okay. But do you expect users to check on the pricing
9 before the two- to three-week period expires, correct?

10 **A.** I think it depends on what you mean by check on the
11 pricing.

12 **Q.** We talked about using the external link entitlement in
13 your sign-in page earlier. Do you recall that?

14 **A.** I do.

15 **Q.** If you put the discount on the sign-in page, you would
16 expect that some people, when they sign up, even before the
17 two- to three-week period starts, they're going to take a peek
18 at your website and just see what the prices are afterwards,
19 correct?

20 **A.** If we put on that page, yes, I would not expect zero users
21 to click on it.

22 **Q.** Okay.

23 **A.** That's correct.

24 **Q.** Okay. And for those people who take a peek, you don't
25 expect them to then actually make a purchase on the spot

1 because they're just about to start a two- to three-week trial
2 period, correct?

3 **A.** Well, just to be clear, they can't even take a peek. If
4 they click the link, they're going to arrive on the log-in
5 page, and they haven't created an account yet.

6 **Q.** Okay. But they're -- if they create an account, well --
7 (Simultaneous colloquy.)

8 **BY MR. LO:**

9 **Q.** That's your choice, correct? You could, on the log-in
10 page on the website also show them what the prices are.

11 **A.** Yes, but we could not customize that for the user.

12 **Q.** Well, your -- but you don't need to, sir. Your prices are
13 7.99, 39.99, or 19.99 on sale. And you can actually customize
14 that depending on whether you are running a sale or not,
15 correct?

16 **A.** Those are our standard prices. We do offer different
17 price. For example, if a user had previously subscribed and
18 since unsubscribed, we will often offer them a discount.
19 That's a different price we might very much want to show that
20 user on the website landing page, and that's the kind of
21 customization that we cannot do with the static link.

22 **Q.** Okay. But if they already had it, then they already have
23 a log-in correct?

24 **A.** Sure. I could imagine wanting to do customizations based
25 on users being in different locations. But sure.

1 Q. Sir, for your average user, if they clicked on the link
2 from the sign-in or sign-up page, they can immediately go to a
3 page where you show them what the current prices are for
4 subscriptions, correct?

5 A. Yes, assuming there is a single current price, yes,
6 correct.

7 Q. Okay. And there typically is a single current price
8 listed for your U.S.-based customers on your website, correct?

9 A. Yes, although I want to add that if it was during a sale
10 period, they may be seeing a sale price that is not going to
11 be on offer by the time their trial is over.

12 Q. Sure. But you would let them know that.

13 A. Sure.

14 Q. Okay. So they would look at the prices at the time that
15 they first open the app. At least some people will do so,
16 correct?

17 A. Yes.

18 Q. And you would then encourage them here's the price but
19 don't buy it right now unless we're running a special price,
20 correct?

21 A. No.

22 Q. You wouldn't?

23 A. I already said we said you may do that in the FAQ. I
24 don't think we actively encourage people to wait.

25 Q. If you wanted to avoid Apple's seven-day window, you would

1 tell your users -- or you could tell your users on the website
2 take advantage of the free trial period and come back in two
3 to three weeks, correct?

4 **A.** If all we were trying to do was avoid Apple's commission,
5 yes, but we're also risking that these users might -- we're
6 losing some subscriptions by delaying people subscribing. We
7 show, for example, this pop-up right away as soon as they
8 create their account. We don't delay showing it until after
9 the trial.

10 **Q.** Okay. But you have no data in terms of the people who
11 clicked on the Google app link who go out in terms of how
12 quickly they actually made a purchase, correct?

13 **A.** Correct. I don't have that data.

14 **Q.** Okay. And you understand that Apple's seven-day rule
15 applies from the time that they click out from the link in the
16 app, correct? That's the metric by which the seven days is
17 measured.

18 **A.** Correct. That's why I did my analysis by measuring from
19 the time they clicked the link in the email.

20 **Q.** No, sir. The time they click on the email, they're
21 already on the verge of running out of their two- to
22 three-week subscription, correct?

23 (Simultaneous colloquy.)

24 **THE WITNESS:** That's correct but -- sorry.

25 / / /

1 BY MR. LO:

2 Q. Let's just -- that is -- that is how your email is timed
3 that you testified to, correct?

4 A. That is how the email is timed. That's also how I expect
5 we would time the external purchase link within the app.
6 You're assuming that we would put in our log-in page. That is
7 not something that we've ever discussed. Or I don't think we
8 would want to do that. It would not be a good experience.

9 Q. Okay. But you could put your external purchase link in a
10 way that leads people to go out right away. You could do
11 that, correct?

12 A. Sure.

13 Q. And you could remind people both on your website and in
14 email that, look, come back in two to three weeks, take
15 advantage of the free period. You could choose to do that,
16 correct?

17 A. We could do that.

18 Q. And in fact, you could even remind your users, both on
19 your website and through an email, when you come back, come
20 straight to the website, don't click on that link again
21 because it will just make me a little bit more money and
22 you're helping out a small business. You could message that
23 if you wanted to. Correct?

24 A. I believe that would be permitted, correct.

25 Q. Okay. And in that situation, if those users took you up

1 on your direction, meaning come back in two to three weeks, go
2 directly to the website, you would have avoided the --
3 seven -- the seven-day window, correct?

4 **A.** Yes. I suppose we could just tell them to wait seven
5 days. There's no reason they have to wait for the trial to be
6 over, given what you're trying to say.

7 **Q.** Exactly. And indeed all developers with a
8 subscription-based model could offer their customers a free
9 window of trial and suggest that come back after seven days
10 after your trial runs out and come back directly so I make a
11 little bit more money. That's an option that's available to
12 all subscription-based developers, correct?

13 **A.** You could make those communications outside of the app,
14 correct.

15 **Q.** Okay.

16 **MR. LO:** Pass the witness, Your Honor.

17 **THE COURT:** Redirect limited to the scope of cross.

18 **MR. BORNSTEIN:** Thank you, Your Honor.

19 **REDIRECT EXAMINATION**

20 **BY MR. BORNSTEIN:**

21 **Q.** Mr. Simon, you were just asked a series of questions about
22 ways that you could structure the link to encourage people to
23 wait seven days and avoid the commission.

24 Would you actually consider structuring your app that way?

25 **A.** No.

1 Q. Why not?

2 A. Generally we're trying to encourage people to subscribe.

3 The -- yeah, I -- I feel like that's obvious that we want

4 people to subscribe to our service.

5 Q. So the gymnastics to avoid the commission is something

6 that would be attractive to you or not?

7 A. No.

8 Q. Okay. You were asked some questions this morning before

9 the lunch break about testimony that you gave in -- in this

10 proceeding and in other proceedings. Do you recall that?

11 A. I do.

12 Q. And some of the questions were about the amount that Down

13 Dog pays in the payment processing. Do you recall that?

14 A. I do.

15 Q. And a lot of the questions had to do with variances in the

16 testimony 3.5, 3.65, and so forth. Do you recall that?

17 A. I do.

18 Q. And I think the -- excuse me -- I think the suggestion was

19 that you were not truthful. Right? That's, I think, what --

20 did you understand that's what counsel was trying to get at?

21 A. I did.

22 Q. Okay. Can we look at your actual testimony rather than

23 counsel's characterizations, please.

24 You have in your binder, tab 1, the binder that Mr. Lo

25 gave you. And we can put this on the screen, too.

1 This is your declaration in this matter, correct?

2 A. Yes.

3 Q. All right. And this was --

4 (Demonstrative published.)

5 MR. BORNSTEIN: Excuse me.

6 Q. The source of some of the questioning on whether you said
7 3.5 or something else, right?

8 A. Correct.

9 Q. All right. Can you look, please, at paragraph 32. It's
10 on the bottom of page 8. It's also on the screen if that's
11 helpful.

12 Would you please just read what it was you actually
13 testified the commissions were that you paid for processing.

14 A. Do you want me to start at the beginning of this paragraph
15 or just read the sentences.

16 Q. Just what's highlighted there.

17 A. Okay. "Down Dog's website prices have always been lower
18 than prices offered in its apps because we pay significantly
19 lower processing fees for our website purchases, about 3-1/2
20 to 6-1/2 percent for Stripe or PayPal payments on our website
21 versus the 15 to 30 percent fee collected by Apple for in-app
22 purchases."

23 Q. Do you consider 3.5 -- excuse me -- 3.65 to be about 3.5?

24 A. I do.

25 Q. Do you stand by the testimony that you gave in this

1 declaration?

2 A. I do.

3 Q. All right. And what about in the Google trial. Why don't
4 we look at what you actually testified to in the Google trial.

5 (Demonstrative published.)

6 BY MR. BORNSTEIN:

7 Q. Do you recall when you were asked about the Google trial,
8 you actually told Mr. Lo you thought you testified "about
9 3 percent." And he moved on.

10 A. I do.

11 Q. All right. So is this on the screen here, from page 291
12 of the transcript of the jury trial against Google, is this
13 your actual testimony about the prices that you pay for
14 payment processing?

15 A. It looks to be that, yes.

16 Q. And can you -- I'll read the question, you can read the
17 answer.

18 "Q. And when your users sign up on the web using PayPal
19 or their credit card, approximately how much does Down Dog pay
20 to process those transactions?"

21 What did you respond to that question?

22 A. I answered: "It varies because it's structured, I
23 believe, as like 30 cents plus a tiny percentage. But all in
24 all, it ends up being roughly 3 percent."

25 Q. Do you stand by that testimony too?

1 **A.** I do.

2 **Q.** And can you just explain for a minute what you mean when
3 you say that the percentage varies because of how it's
4 structured?

5 **A.** Yes. Because it's a constant amount plus a percentage of
6 the transaction, it's different based on the price of the
7 transaction. And one thing I was trying to say earlier was
8 that most of specifically the website purchase options are
9 made for the annual price. So the -- I was primarily thinking
10 about the I guess what is technically 3.65 percent number
11 rather than the higher number.

12 **Q.** Excuse me.

13 You recall there were some questions about whether or not
14 you had an incentive to shade the testimony in one way or the
15 other in different proceedings?

16 **A.** I do.

17 **Q.** And the questions were that you had an incentive to go on
18 the lower side in the jury trial against Google and in the
19 higher side in the proceedings today; is that right?

20 **A.** Yes.

21 **Q.** And if those were your incentives, Mr. Simon, you did a
22 really bad job, didn't you?

23 **A.** You could say that.

24 **Q.** Well, I mean you -- you testified in your declaration
25 "about 3.5 percent." That's less than 3.65, correct?

1 A. That's correct.

2 Q. So did you move in the direction that Mr. Lo suggested you
3 might, or did you go in the opposite direction?

4 A. It was the opposite direction.

5 Q. Now, the fees that you do pay for Stripe, are they
6 publicly available, those numbers?

7 A. I believe so.

8 Q. Well, does Stripe have publicly available numbers?

9 A. Yes, they do.

10 Q. And do you pay the published price for Stripe processing?

11 A. Yes, I believe we do.

12 Q. And is the same true for PayPal? Do you pay the published
13 price for processing for PayPal?

14 A. Yes.

15 Q. So if there were any doubt about what your numbers were,
16 anybody could go to the website for Stripe and PayPal and find
17 out what those numbers are?

18 A. That's correct.

19 Q. There were a couple of questions with charts and algebra
20 that counsel put together. And I think the implication of
21 those questions was that you make different amounts depending
22 on where a subscriber purchases, correct?

23 A. Correct.

24 Q. Now, all of those charts, were they done with iOS pricing
25 or were they done with Android pricing?

1 **A.** They were done with, I guess, Android pricing because they
2 were using 15 percent.

3 **Q.** Yeah, and if it were iOS pricing, what would the price be
4 in the first year?

5 **A.** They would take a 30 percent commission in the first year.

6 **Q.** And would that substantially change the numbers that we
7 were looking at?

8 **A.** Definitely.

9 **Q.** Okay. Incidentally, if someone under the new
10 subscription -- excuse me -- purchase link program that Apple
11 has, if the user clicked on the link and got a subscription at
12 that point, what would the commission be that they would pay
13 in the first year?

14 **A.** Sorry. Can you repeat that one time.

15 **Q.** Sure. Under Apple's program, someone clicks a link, they
16 buy a subscription on your website after clicking the link,
17 what's the commission in the first year?

18 **A.** 27 percent.

19 **Q.** And what happens if that subscription auto-renews for the
20 second and the third year and so on?

21 **A.** I believe Apple is entitled to 12 percent in the following
22 years.

23 **Q.** And is that true even if the user never goes back and
24 clicks the link again?

25 **A.** Correct.

1 Q. It just continues on and on until the subscription somehow
2 changes?

3 A. Yeah, I believe it's true even if the user doesn't use the
4 app within iOS at all anymore.

5 Q. Now, there were some -- moving to a new topic. There were
6 some questions about whether or not you could put the purchase
7 link on the initial sign-in screen that people see the first
8 time they pull up the Down Dog app. Do you recall that?

9 A. I do.

10 Q. And I think the implication there, the questions were if
11 you did that, every user would see the link at least once,
12 right?

13 A. Yes.

14 Q. And you gave some testimony I want to give you the
15 opportunity to amplify on. You said that people wouldn't
16 follow the link and sign up before doing the practice. Can --
17 can you explain what you were talking about there?

18 A. Yes. We've done a lot of experiments around specifically
19 what's often referred to as the onboarding flow of how -- how
20 a new -- what the brand-new user experiences.

21 And so throughout that we've -- we found out that, as one
22 example, most apps that do free trials do auto-renewing trials
23 where you actually sign up with in-app billing right away, and
24 then you're automatically charged at the end of the free trial
25 period.

1 We did an experiment testing that versus a what we call a
2 truly free trial. And even though -- even though users
3 wouldn't auto-renew, we found that we got more total
4 subscriptions at the end of that because if you make them do
5 an auto-renewing trial, a lot of users won't even try out the
6 app.

7 So we have -- we have a lot of data that suggests t=at
8 users try out the app, and then that's why they -- they
9 purchase. We've also experimented with like how long the
10 trial period should be.

11 So there's just a ton of data we have at this point
12 suggesting that the users need to try out the app before most
13 of them will purchase.

14 **Q.** All right. So if Down Dog did have the purchase link on
15 that -- that sign-in screen that counsel was asking you about,
16 would you find that to be a useful structure for -- or useful
17 design for getting people to click on the link?

18 **A.** No. A very common pattern is that basically you want to
19 do an onboarding flow and collect information from the user
20 before you ever present pricing.

21 **Q.** And if the link were in fact on that sign-in page, under
22 Apple's rules, could it be anywhere else in the app?

23 **A.** No. I believe the rule says it has to be on a single
24 page. I actually think the rule says it has to be on a single
25 dedicated page, if I'm not mistaken, which also would suggest

1 it can't be on your log-in page. That's not a dedicated page
2 to the purchase link.

3 Q. Well, let's just hypothesize for a second that counsel was
4 right that you could put it there, even if there might be some
5 confusion in the -- in the guidelines.

6 Suppose a user had signed up and was in their free trial
7 period, and they decided that they did in fact want to
8 subscribe. What would that user have to do to get back to the
9 link on the sign-in page?

10 A. I suppose they could log out of the app or uninstall the
11 app and reinstall it.

12 Q. Is there any other way for them to get back to that
13 sign-in page link after they've started their free trial?

14 A. No.

15 Q. What do you think about that as a user experience?

16 A. I think they're going to be very confused, and frustrated
17 probably with us.

18 Q. There were some questions right at the beginning of your
19 cross-examination -- or counsel's examination about whether
20 you had data on how Apple's current external purchase link
21 guidelines would affect user behavior. Do you recall that?

22 A. I do.

23 Q. And you said you had something similar. What were you
24 talking about?

25 A. I think mostly I was think --

1 **MR. LO:** My objection -- my cross-examination was the
2 lack of data. I don't think recross is the place to inject it
3 for the first time.

4 **THE COURT:** Overruled.

5 **THE WITNESS:** Would you mind repeating the question?

6 **BY MR. BORNSTEIN:**

7 **Q.** Sure. In response to counsel's question about data, you
8 said "I have something similar," and I just want to give you
9 the opportunity to explain what that is that counsel didn't
10 give you. What were you talking about?

11 **A.** I think I was primarily referring to the data we've talked
12 about on Android where we tested having the link and not
13 having the link.

14 **Q.** Great. Thank you.

15 **MR. BORNSTEIN:** I have no further questions, Your
16 Honor.

17 **THE COURT:** Recross limited to the scope of the five
18 topics.

19 **MR. LO:** Nothing further, Your Honor. Thank you.

20 **THE COURT:** All right.

21 Sir, you're excused.

22 **THE WITNESS:** Thank you, Your Honor.

23 **THE COURT:** Next witness.

24 **MS. MOSKOWITZ:** Lauren Moskowitz for Epic.

25 Your Honor, Epic calls Alec Shobin.

1 **THE COURT:** How do you spell the last name?

2 **MS. MOSKOWITZ:** S-H-O-B-I-N.

3 **THE COURT:** Thank you.

4 **MS. MOSKOWITZ:** Thank you.

5 **THE COURT:** Sir, please stand so you could be sworn.

6 **THE CLERK:** Raise your right hand, sir.

7

8 **ALEC SHOBIN,**

9 called as a witness by the plaintiff, having been duly sworn,
10 testified as follows:

11 **THE CLERK:** Thank you.

12 Please be seated and speak clearly into the microphone.
13 Please state your full name and spell out your last name for
14 the record.

15 **THE WITNESS:** My name is Alec Shobin, S-H-O-B-I-N.

16 **THE COURT:** Good afternoon.

17 **THE WITNESS:** Good afternoon.

18 **THE COURT:** You may proceed.

19 **MS. MOSKOWITZ:** Thank you, Your Honor.

20 **DIRECT EXAMINATION**

21 **BY MS. MOSKOWITZ:**

22 **Q.** Good afternoon, Mr. Shobin.

23 **A.** Good afternoon.

24 **Q.** Where are you employed?

25 **A.** Epic Games.

1 Q. And when did you join Epic?

2 A. In January 2019.

3 Q. And what is your current title?

4 A. Director of marketing.

5 Q. And what is your overall role or responsibility in that
6 position?

7 A. I'm responsible for marketing the Fortnite ecosystem, as
8 well as mobile growth.

9 Q. So let's take those in turn. Can you tell us a little bit
10 more about your work in connection with the Fortnite ecosystem
11 growth?

12 A. Yes. My team is responsible for marketing the latest
13 events and products in Fortnite, making sure that players are
14 engaged and entertained and aware of cool things that they
15 might be interested in.

16 Q. Could you give the Court an example of a project that
17 you've worked on in that area?

18 A. Yes. One of the recent things we worked on was the Item
19 Shop, making it feel more premium. It hadn't been updated in
20 many years. And with some of the new games launching in
21 Fortnite, we wanted to make it easier for players to find
22 different things that they're looking for and kind of
23 highlight the cool things that might interest them.

24 Q. Can you remind the Court what the Item Shop is?

25 A. The Item Shop is where players can buy outfits and other

1 kind of cosmetic items and dances that they can use in the
2 game.

3 Q. And you also mentioned working on growing mobile for Epic.
4 Did I get that right?

5 A. Yes.

6 Q. And just to set the table, on what mobile or which mobile
7 platforms are Epic's apps available?

8 A. IOS and Android.

9 Q. So let's start with iOS. Which of Epic's apps are
10 available on iOS?

11 A. We have Rocket League Sideswipe, among others, on iOS.

12 Q. Rocket League Sideswipe. And I'll ask about that in a
13 moment.

14 We've all heard about Fortnite. Is Fortnite available on
15 iOS today?

16 A. No. Fortnite was kicked off the App Store in August 2020.

17 Q. And has Fortnite returned since then?

18 A. It has not.

19 Q. Rocket -- you mentioned Rocket League Sideswipe. What is
20 Rocket League Sideswipe?

21 A. Rocket League Sideswipe is a multiplayer game where
22 players in race cars try to knock giant soccer balls into each
23 other's goals.

24 Q. Does Epic offer in-app purchases on the Sideswipe iOS app?

25 A. We do not.

1 Q. Why not?

2 A. Epic disagrees with Apple's business practices around
3 monetization for apps in the App Store.

4 Q. So let's talk about Android for a moment. Which of Epic's
5 apps are available on Android?

6 A. In addition to Rocket League Sideswipe, we distribute
7 Fortnite on Android as well.

8 Q. And we may not be as familiar with how apps can be
9 distributed on Android. How does Epic make Fortnite available
10 on Android?

11 A. Epic allows players to download Fortnite directly from
12 Epic on Android.

13 Q. And does Epic distribute Fortnite any other way on
14 Android?

15 A. No. We do not.

16 Q. Is it available on any stores, for example?

17 A. No.

18 Q. Is it available on the Google Play Store?

19 A. No. It is not on the Google Play.

20 Q. And what is the Google Play Store?

21 A. The Google Play Store is basically Google's version for
22 Android distribution similar to the App Store.

23 Q. Does Epic also distribute Fortnite through Samsung's
24 Store?

25 A. That's correct. We do sell it through the Galaxy Store.

1 Q. Okay.

2 A. Sell it, distribute it.

3 Q. And going back to the first distribution method you
4 mentioned, the directly from Epic's website. Can you explain
5 for the Court a little bit more that process, what that is?

6 A. Yes. We have a landing page for Fortnite that players can
7 find by searching on Google or looking at our website. They
8 then press a download button to initiate the process. And
9 they quickly run into a number of scare screens that Google
10 implements throughout the process that players need to
11 navigate, checking various settings, allowing for the app to
12 be distributed.

13 We see pretty significant dropoff when players are faced
14 with these scare screens, even though they go to that page to
15 download Fortnite, they're showing that intent, they still
16 don't make it through the process because of these jarring
17 screens.

18 Q. We'll come back to that. Let's talk about Apple a bit
19 more here.

20 Are you familiar with Apple's app review guidelines?

21 A. Yes.

22 Q. And how have you had occasion to become familiar with
23 Apple's app review guidelines?

24 A. When Fortnite was distributed in the App Store, I was
25 partially responsible for making sure that we could release

1 updates, Fortnite updates, about every two weeks.

2 And so one of my responsibilities was being familiar with
3 the app review guidelines so that we could continue to update
4 Fortnite.

5 Q. In your current role, even though Fortnite is not on the
6 App Store, do you continue to have exposure to Apple's app
7 review guidelines?

8 A. I do.

9 Q. And in what capacity do you continue to have that
10 exposure?

11 A. Working on mobile growth, I try to stay aware of any
12 changes to the app review guidelines, looking for potential
13 opportunities.

14 Q. Are you familiar with the recent updates to Apple's app
15 review guidelines relating to external purchase link
16 entitlements in the U.S.?

17 A. Yes.

18 Q. And when did you first learn about this update that they
19 were making to their review guidelines?

20 A. In January of this year.

21 Q. And in January, did you -- did you sit down and study the
22 details of those guidelines at that time?

23 A. No. Discussed them with the broader kind of mobile team.

24 Q. Why didn't you sort of read them cover to cover and study
25 them at that time?

1 A. Some of the other team members looked into it a bit more.

2 We decided it wasn't an option for us to pursue.

3 Q. Did there later come a time where you did sit down to
4 study the revised guidelines?

5 A. Yes. I wanted to be able to share my perspective on them
6 here today. So I reviewed them much more in depth.

7 Q. And I think you just mentioned that the team had decided
8 that they weren't going to take advantage of it, but I'll just
9 ask you specifically: Is, to your knowledge, Epic considering
10 implementing in-app purchases on Rocket League Sideswipe based
11 on Apple's new external link?

12 A. No, we are not.

13 Q. Why not?

14 A. We still disagree with Apple's business practices around
15 making purchases through the external purchase link.

16 Q. All right. Let's talk a bit more in detail about the
17 external purchase link entitlement.

18 And if you could please turn to your -- in your binder to
19 CX-13, which is in evidence and we'll also put it on the
20 screen.

21 (Exhibit published.)

22 **BY MS. MOSKOWITZ:**

23 Q. Have you reviewed this document before?

24 A. Yes.

25 Q. And what are we looking at here?

1 **A.** These are Apple's app review guidelines.

2 **Q.** And let's please turn to page 12 which is where
3 section 3.1.1.(a) appears. Do you see where I am?

4 **A.** Yes.

5 (Exhibit published.)

6 **BY MS. MOSKOWITZ:**

7 **Q.** What is this provision?

8 **A.** This is where Apple introduces the external purchase link
9 entitlement in the app review guidelines.

10 **Q.** Is this where you, as a developer, would go to learn about
11 the actual requirements that the external purchase link must
12 comply with?

13 **A.** This is the starting point, but if you see the "Learn more
14 about these entitlements" section, entitlements is a link that
15 takes you to another page. That page then lists out a number
16 of different other links for different regions or countries.
17 And you need to find the link to the U.S. entitlement and then
18 click through that for more information.

19 **Q.** All right. So let's -- let's go to CX-3.

20 (Exhibit published.)

21 **BY MS. MOSKOWITZ:**

22 **Q.** Do you see that up on the screen?

23 **A.** Yes.

24 **Q.** And have you reviewed this document before?

25 **A.** I have.

1 Q. This is also in evidence, of course.

2 What is this document?

3 A. This is Apple's, I think it's like a developer blog where
4 they tell more information about how to actually request the
5 entitlement and the associated rules.

6 Q. And how do you get to this page?

7 A. As I mentioned before, in the app review guidelines,
8 clicking that entitlements link, going to that other page that
9 has a number of different links for other countries, finding
10 the link to the U.S., then that will bring you here.

11 Q. All right. So let's talk about some of the requirements
12 that are found in here. And if we could start on page 5.

13 (Exhibit published.)

14 **BY MS. MOSKOWITZ:**

15 Q. Starting on the bottom, do you see a section that's
16 labeled "In-App System Disclosure Sheet"?

17 A. I do.

18 Q. And there's a picture of a screen that appears on the
19 right; do you see that?

20 A. Yes.

21 Q. What is this section of requirements conveying to you?

22 A. This is where Apple first introduces the scare screen that
23 they show whenever someone clicks the external purchase link.

24 Q. And have you seen screens like this, not exactly like
25 this, but of this sort before in the context of your work at

1 Epic?

2 **A.** This is similar to the screens that Google shows during
3 the direct download process on Android.

4 **Q.** And you mentioned it a bit, but just to come back to it.
5 In your experience in connection with those screens that are
6 imposed by Google, how have those screens affected the user
7 experience of actually going through the installation flow on
8 Android?

9 **A.** Even though on Android players are showing the intent of
10 downloading Fortnite by going to the landing page, clicking
11 the link to begin that process, we see significant dropoff as
12 soon as players see screens like this.

13 **Q.** And just at a high level, we'll dig in, but at a high
14 level what is your overall view on this screen popping up with
15 the requirement that the screen be presented to users?

16 **A.** It's kind of strange to me, honestly. I don't believe any
17 screen is shown when people are making purchases of physical
18 goods. I don't see a screen like this when I'm ordering an
19 Uber or ordering something on Amazon, or making other web
20 purchases.

21 So it's bizarre to me that people need to see a screen
22 like this to make a web purchase when people have been making
23 web purchases for decades now.

24 **Q.** And in terms of the screen itself, what it's presenting in
25 here, do you have any views on the presentation of what the

1 screen looks like in addition to it being presented at all?

2 **A.** Yes. So I'm an iPhone user myself, have been for many
3 years. And I actually haven't seen a kind of full screen
4 interrupt like this for other things.

5 If you do location sharing, which is presumably very
6 sensitive information, that's a much smaller screen that comes
7 up with less words. Then I see just like the 50 percent of
8 this is big bold text, and maybe 25, 30 percent of this screen
9 is then much smaller text that you will have to read through,
10 and a few buttons at the bottom. It's just a lot of
11 information, and it seems unlike some of the other screens
12 that I've seen in the Apple ecosystem.

13 **Q.** And you had mentioned the screens that were -- or are
14 presented on Android. Are those full-screen takeovers like
15 this?

16 **A.** No. They are smaller than this screen.

17 **Q.** So the dropoff that you see in the Android screens are
18 from screens that are smaller than this?

19 **A.** Yes.

20 **Q.** Let's talk about the language itself. Let's start with
21 the bold language.

22 Do you have any concerns as a developer of what's being
23 communicated in this bolded language?

24 **A.** Yes. Where it says "Apple is not responsible for the
25 privacy or security of purchases made on the web," that

1 immediately implies that purchases made on the web may have
2 privacy or security issues.

3 **Q.** And what is the concern to you as a developer for that
4 implication?

5 **A.** Like I said before, people have been making purchases on
6 web for decades now. You know, I buy things on Amazon
7 regularly, and I'm not usually concerned about privacy or
8 security. But by calling that out, it makes a much less kind
9 of neutral message, and you immediately kind of question the
10 place that you're going to when you see something like that on
11 the screen here.

12 **Q.** And let's move to the second half of the screen, the other
13 language below the bold. Do you have any concerns about the
14 messaging that's being communicated in this section of the
15 screen?

16 **A.** I do. Where it says, "Related features such as
17 subscription management and refund requests will not be
18 available," that's quite concerning because people offer, you
19 know, refund requests and honor them on websites all the time.

20 **Q.** And what about this language in your view is sending a
21 different message to users?

22 **A.** In particular, the refund requests will not be available,
23 I think like me, as a consumer, I would immediately kind of
24 question like, oh, the place I'm going to or can I not get a
25 refund? What's going on here? And I'll cancel out of this.

1 Q. All right. Let's look at some of the other requirements.
2 Still on page 5 a bit above this screen, there's a section
3 "Style and Icon." Do you see where I am?

4 (Exhibit published.)

5 THE WITNESS: Yes.

6 BY MS. MOSKOWITZ:

7 Q. And what are the requirements that are being communicated
8 here?

9 A. This is where Apple is talking about what the link must
10 look like. They're characterizing it as what they call a
11 plain button style, and they show these among other, quote,
12 unquote, button styles in the human interface guidelines.

13 But it does go on to say here that it can't be enclosed in
14 shape that uses a contrasting background fill. The background
15 surrounding the text must match the background of your apps
16 page. That means that what you're showing is basically just
17 text and not a button. And so it's like a link.

18 Q. And why, in your view, is that not a button?

19 A. When we make buttons in Fortnite, we usually have some
20 kind of, you know, big bold shape around them. We have some
21 kind of color in the background of the button that's different
22 from the background of the app. That's what players in
23 Fortnite are generally looking for when they want to interact
24 with something or navigate a page, they look for a button.

25 Q. So if you had the choice, what would you want this

1 external purchase link to look like if you were going to
2 deploy it?

3 **A.** I would make it look like a button. Like I said, we
4 typically have some kind of, like, big bold rectangle around
5 text in the center, and then maybe yellow in the background of
6 the button. That's pretty normal for our ecosystem.

7 **Q.** Do you have any concerns with how users might react if you
8 did not have it look like every other button in Fortnite but
9 looked like a plain link?

10 **A.** Yes. I don't think we have many, if any, just like text
11 links in Fortnite itself. And so, you know, like I said,
12 players are normally looking for some kind of button, maybe a
13 yellow button. And so they may not see this. If they do see
14 it and it's just like a link on a page, it may look like some
15 kind of hack or something that wasn't intended to go there
16 because it doesn't really align with sort of our branding and
17 our normal UI.

18 **Q.** Do you have personal experience at Epic with using buttons
19 versus links?

20 **A.** I do.

21 **Q.** Can you tell us a bit about that experience.

22 **A.** Yes. We were recently taking a look at the landing page
23 that you can go to on web to download Fortnite. There are a
24 lot of different options there previously. Fortnite, in
25 addition to being able to directly download it on PC, for

1 example, you can also play it on a number of different
2 streaming services.

3 And we wanted to, for the most part, majority of players
4 are looking to access it by downloading it directly from us
5 instead of using the streaming services, which will either
6 require some kind of log-in or maybe a subscription to them.
7 And so they're less used.

8 And so in order to kind of help players find what they
9 were looking for, this direct download, I asked the team to
10 turn that into kind of a big yellow button in the middle of
11 the page and deprioritize the lesser used options with a kind
12 of link to more ways to play. So they could still find if
13 that's something that they're looking for, but this was
14 generally to make the process easier for players that were
15 looking to find how to download Fortnite.

16 Q. So when you wanted to deprioritize options, what style do
17 you use?

18 A. I asked the team to just make it look like a link.

19 Q. And based on your experience, how do you expect your users
20 would react to seeing the link -- a link in lieu of a button
21 for purposes of making a payment?

22 A. I think firstly they probably wouldn't see it because it's
23 not something they're looking for. They're looking for these
24 yellow or blue buttons in most cases. And then if they did
25 see something like this, it would really not look consistent

1 with rest of our UI, the different screens in the game. It
2 might look like, you know, Fortnite was hacked or something
3 like that if they saw something that was so out of place as to
4 just be a link.

5 **Q.** And just to follow up on one term in there, "UI" refers
6 to...?

7 **A.** User interface.

8 **Q.** Let's look at the templates requirement which is also on
9 page 5. What is your understanding of the requirements set
10 forth here?

11 **A.** This is where Apple is requiring specific language to be
12 used around the links to the external purchase page. I think
13 there's five to seven different options. It's kind of unusual
14 to me because as far as I know, Apple doesn't have
15 requirements about specific language that appears in apps and
16 any other kind of scenario.

17 **Q.** What is your view on the restrictions here on these sort
18 of options that they're allowing or requiring you to -- to
19 comply with?

20 **A.** It's a little bit generic. It's not really custom
21 tailored to each, you know, what developers might be offering.
22 For instance, Epic offers Epic rewards when people make
23 purchases through our website today.

24 Based off of this, well, you can say things like lower
25 prices offered or get X percent off. Normally, when we're

1 promoting things in our web purchase flow, we really
2 emphasize, you know, I think the 5 percent or more Epic
3 rewards that you get when you make a purchase.

4 And so that's exactly the kind of thing that we would want
5 to couple with this external purchase link, but we would not
6 be able to.

7 Q. So would you be able to say, "For five percent Epic
8 rewards go to our website," under these requirements?

9 A. No.

10 Q. Let's talk about yet another requirement. The Court has
11 heard a bit about, so we'll cover it briefly, page 4 has a
12 list of requirements, and I'm going to talk about the fourth
13 one. Do you see where I am?

14 A. I do.

15 Q. And what is this fourth bullet, "The link must be
16 statically defined" requirement conveying to you?

17 A. This is saying that the external purchase link must lead
18 all players basically to an identical page that's completely
19 generic and doesn't necessarily factor in any of their current
20 experiences in the game, like filtering out purchases that
21 they already made, for example.

22 Q. And what's wrong with that?

23 A. People could click this and then go to a page where they
24 would see things that they already purchased. They could get
25 confused. They could attempt to purchase it again. I could

1 see all kinds of issues coming up from that. Normally we try
2 to remove that from any screens if they've already bought
3 something so they don't attempt to buy it again.

4 **Q.** So if you had a choice, what type of link would you
5 provide in an external purchase link in lieu of this
6 statically defined link?

7 **A.** We would want to use some kind of dynamic link. Players
8 are already logged in to Fortnite using their Epic Games
9 account. Naturally if they're going to another page to make a
10 purchase, they would likely -- I mean, me as a user would want
11 to be automatically logged in to that page so it took into
12 account my previous purchases.

13 **Q.** And sticking with this list, I'll go to another
14 requirement, the last one. This says that the link must not
15 be displayed on any page that is part of an in-app flow to
16 merchandise or initiate a purchase using in-app purchase. Do
17 you see that?

18 **A.** I do.

19 **Q.** And what's your view of this requirement?

20 **A.** This is extremely confusing to me. It's saying that you
21 can't have this link in an in-app flow to merchandise. But in
22 Fortnite, there's really two screens that players know to
23 navigate to to make purchases. They're the Item Shop that I
24 mentioned before, or they would go to the V-Bucks page.

25 If we aren't allowed to include this link on any of those

1 pages, I don't even know that players would know to find it.
2 I doubt that they would know that there's kind of different
3 purchasing flows that they could use or be able to make that
4 comparison accurately.

5 **Q.** In your experience, where would you put, if you had a
6 choice, an external purchase link?

7 **A.** I'd want to show something like this side by side with
8 where they're making the other purchases, either in the Item
9 Shop or the V-Bucks page.

10 **Q.** And are you allowed to do that?

11 **A.** It appears not.

12 **Q.** And separate from the purchase link and the link
13 requirements we've talked about, does Apple allow developers
14 to include within their app other calls to action that talk
15 about alternative payment mechanisms?

16 **A.** As far as I know, they don't.

17 **Q.** Would Epic like to be able to have calls to action inside
18 the app that talk about alternative payment methods that don't
19 also at the same time include a link to that website?

20 **A.** We would.

21 **Q.** Can you give me an example of how that might arise?

22 **A.** Yes. One of the things I work on is our kind of Crew
23 subscription product. Each month people can buy a pack and
24 they'll get a new outfit from that pack. We usually start
25 advertising and promoting that outfit with a big reveal about

1 five days before it becomes available for purchase.

2 We do this every month just in our message of the day,
3 revealing this outfit to players, telling them to get ready to
4 make the purchase in several days, and then they'll be able to
5 unlock it.

6 Q. And you can tell them about that in the app today, right?
7 That would be -- well, if you had an app, you would be allowed
8 to tell them that today, right?

9 A. Yes.

10 Q. Would you be able to tell them about going to the website
11 to make a purchase of that Crew subscription to get some sort
12 of Epic rewards; could you talk about that?

13 A. Sounds like not without the link to that website present
14 there. And that's exactly what we would want to do, you know.
15 This new outfit is going to be available for purchase in five
16 days. Go to our web store to get Epic rewards when you
17 purchase it there.

18 Q. I just want to turn briefly to the commission that Apple
19 is going to charge. Are you familiar with the fee that Apple
20 is imposing on these external purchase link entitlements?

21 A. I am.

22 Q. And how much is Apple charging for that?

23 A. They're charging 27 percent.

24 Q. And do you have an understanding as to the time period in
25 which Apple will be collecting that commission?

1 **A.** They collect that commission on all purchases made within
2 seven days of someone clicking that link.

3 **Q.** And what is your understanding of how that seven-day
4 period would operate in practice?

5 **A.** As many purchases as someone makes, after clicking that
6 link, Apple would collect the 27 percent commission on it.
7 Even if those purchases weren't necessarily a result of
8 clicking that link, if they, you know, saw an ad on our social
9 media channel several days after clicking it, and they
10 happened to open that page again and make a purchase, they
11 will still collect the commission on that.

12 **Q.** And does Apple collect the 27 percent only for one
13 purchase made within those seven days?

14 **A.** No. It would be for all purchases.

15 **Q.** And for apps that Epic has, do users of those apps or
16 games sometimes make more than one purchase in a week?

17 **A.** They do.

18 **Q.** And with respect to Epic's apps and games, do users of
19 those games sometimes play on more than one platform in seven
20 days?

21 **A.** They do. Fortnite is available on a number of different
22 platforms.

23 **Q.** So if a user had an iOS app and also plays on their PC,
24 for example, and they click on a link on the iOS app, but then
25 for the rest of the week they play and buy on their PC, does

1 Apple collect 27 percent on each of those purchases?

2 A. They would.

3 Q. To your knowledge, does Epic plan to incorporate this
4 external purchase link into any of its iOS apps in the U.S.?

5 A. We're not considering it.

6 Q. Why not?

7 A. We continue to disagree with Apple's business practices
8 around this. The 27 percent remains prohibitive, especially
9 compared to the 30 percent that they were charging for in-app
10 purchases.

11 And as somebody who works on UI, the limitations around
12 where you can show this, what it will look like, I don't even
13 think players would be able to find it in the game and know
14 that it was another option. So it would not be worthwhile for
15 us.

16 MS. MOSKOWITZ: Pass the witness.

17 Thank you, Mr. Shobin.

18 THE COURT: Cross?

19 MR. LO: May I proceed?

20 THE COURT: You may proceed.

21 MR. LO: Thank you.

22 CROSS-EXAMINATION

23 BY MR. LO:

24 Q. Good afternoon, Mr. Shobin.

25 A. Good afternoon.

1 Q. You mentioned earlier that there is a game called Rocket
2 League on the iOS App Store. Did I catch that correctly?

3 A. Rocket League Sideswipe.

4 Q. Sideswipe. That game is distributed by a subsidiary of
5 Epic Games called -- is it Psyonix?

6 A. Yes.

7 Q. And Epic Games, the parent company, as you noted, is not a
8 current developer for iOS, correct?

9 A. We don't have any other apps in the App Store, as far as I
10 know.

11 Q. Right. Well, and -- and Epic Games, as far as you know,
12 is actually not an approved developer for iOS currently; is
13 that your understanding?

14 A. I don't actually know the approval status there.

15 Q. Okay.

16 Now, you mentioned in direct examination that you have
17 currently no plans -- or Epic currently has no plans to
18 utilize the external link entitlement, correct?

19 A. Correct.

20 Q. All right.

21 Now, if Epic were to utilize it, one of the places it
22 would likely send users to is the Epic Games Store. That's a
23 website that is already set up to accept commerce for Epic,
24 correct?

25 A. We do have a website where people can make purchases of

1 V-Bucks.

2 Q. Right. And that's -- that is part of the Epic Games
3 Store, as you call it, correct?

4 A. I think it is a component of that.

5 Q. Okay. And so if the rules were altered in a way that Epic
6 found acceptable, it would send users potentially from a
7 native app to the portion of the Epic Games Store where they
8 could buy V-Bucks, correct?

9 A. We would send them to a website that uses that payment
10 processing where they could choose to buy V-Bucks and likely
11 offer the Epic rewards for those purchases.

12 Q. Right. Because on the Epic Games Store website currently
13 you're obviously not paying a commission to any third parties
14 to process payments, it's just whatever Epic's payment
15 processing fees are, correct?

16 A. I don't know all of the details there.

17 Q. Okay. Has Epic made any efforts to discourage developers
18 from using the external link entitlement?

19 A. Not that I'm aware of.

20 Q. Okay. Are you aware that Mr. Sweeney publicly announced
21 on the day that Apple announced the external link entitlement
22 that Epic will contest Apple's bad faith compliance plan in
23 District Court?

24 A. I did not know that.

25 MR. LO: Okay. Let's pass out some binders.

(Pause in the proceedings.)

THE COURT: You may approach.

THE WITNESS: Thank you.

THE COURT: Okay. And then do you have -- there we go.

Thank you.

BY MR. LO:

Q. Are you aware that Mr. Sweeney previously tried to get companies such as Valve to take actions that might force Apple to reduce its commissions?

A. I'm not familiar.

Q. Okay. Let's take a look at tab 38.

(Demonstrative published.)

THE WITNESS: Okay.

BY MR. LO:

Q. Tab 38 is an email from --

MR. LO: Go ahead.

MS. MOSKOWITZ: Objection, Your Honor. I'm not trying to object to you approaching the witness. The mics aren't working at the table. I apologize.

Foundation. He's nowhere on this email. He just said he wasn't aware. We're going to be going through a Tim Sweeney cross-examination, it seems, through Alec Shobin. It doesn't seem appropriate.

THE COURT: All right. Let's -- give me the exhibit

1 number again.

2 **MR. LO:** It's tab 38, Your Honor. And I will attempt
3 to lay the foundation.

4 **THE COURT:** All right. Let's hear the question.

5 **MR. LO:** Okay.

6 **Q.** Sir, have you seen this email before?

7 **A.** (Reviewing document.)

8 I don't believe so.

9 **Q.** Okay. Back in 2017, this email actually received some
10 press coverage because it was disclosed as part of the
11 exhibits. During that period, were you aware that Mr. Sweeney
12 emailed to Mr. Newell of Valve in an attempt -- well, well,
13 this particular email. That's let's start there.

14 **MS. MOSKOWITZ:** Objection.

15 **THE COURT:** Overruled.

16 Were you aware or not?

17 **THE WITNESS:** I was not. I was not working at Epic
18 at this time, either.

19 **BY MR. LO:**

20 **Q.** Okay.

21 Let me show you one particular statement on this, and I'm
22 just going to ask you whether you agree or disagree with a
23 particular statement.

24 **THE COURT:** So, no, you're not. I'm not going to
25 have you do that as a back door to get something in. Ask a

1 question.

2 MR. LO: Sure.

3 Q. Sir, do you have a view as to whether large developers
4 such as Epic should get a different set of restrictions from
5 smaller developers?

6 A. I think developers should have the same kind of terms.

7 Q. Okay. In other words -- and this is a term that's not my
8 term. In other words, you don't believe that the small
9 developers, quote, unquote, little people, should somehow be
10 subject to -- subjected to more strenuous restrictions in
11 terms of their apps on the iOS or the Android platform than
12 larger developers, correct? You think everybody should be
13 subject to the same rules. Would you agree with that?

14 A. Similar rules make sense to me.

15 Q. Okay. And do you have an understanding as to whether
16 Mr. Sweeney has the same philosophy, meaning that everybody
17 should have the same set of rules? Do you have an
18 understanding one way or the other?

19 A. I don't know with certainty. I assume he does.

20 Q. Okay. Has Epic had any conversations with other
21 developers outside of Epic about whether they intend to use
22 the external link entitlement?

23 A. I don't believe so.

24 Q. Okay. Let's turn to -- it was in your original binder,
25 but we'll put it up on the screen, CX-3.5. And that's the

1 disclosure sheet.

2 (Exhibit published.)

3 **THE WITNESS:** (Reviewing document.)

4 **BY MR. LO:**

5 **Q.** It's also on the screen which will probably frankly be
6 easier to read on the screen, sir.

7 **A.** I see it.

8 **Q.** Epic does not have any data about how actual users are
9 going to react upon seeing this disclosure sheet, right?
10 You've done no study.

11 **A.** This is only based on my professional experience working
12 with other web flows and showing player screens. I don't have
13 data or a specific study on this screen, no.

14 **Q.** Sure. And you can't tell the Court, for example, what
15 percentage of users who encounter this screen will click
16 "Continue" as opposed to "Cancel"? That's not data you have,
17 correct?

18 **A.** I don't have data on this specific screen, but knowing how
19 players interact with these screens on our Android web flow, I
20 suspect a significant amount of people would cancel out of
21 this, myself included.

22 **Q.** Okay. But that's your suspicion. You have no data on
23 that, correct?

24 **A.** That's my professional experience.

25 **Q.** Okay. Do you have any data as to the reasons why people

1 would click "Cancel" upon seeing this specific screen?

2 **A.** Like I said, I don't have data on this specific screen.

3 But when you show someone a jarring screen that has a lot of
4 text on it taking over the full screen like this, I assume
5 that even more people would turn back than they do in our
6 Android flow.

7 **Q.** Well, you testified on direct examination that this screen
8 suggests that the website that the person is going to may not
9 be private or may not be secure. Do you remember that
10 testimony?

11 **A.** Yes.

12 **Q.** You have no actual data as to actual users that have
13 responded to you, saying, yeah, I saw this thing and it really
14 made me think that the website I was going to was insecure or
15 not private. You have no data on that, do you?

16 **A.** I've not asked individuals what they think of these
17 sentences, but in my experience and just seeing this myself --

18 **Q.** Sir, you have no data, yes or no.

19 **A.** No data.

20 **Q.** Okay. And you have no data in terms of whether this
21 disclosure sheet might tell some users something that they
22 didn't already know, you don't have data on that one way or
23 the other, correct?

24 **A.** I've not asked any users what they make of this
25 information.

1 Q. Okay. For example, in the small print, the first sentence
2 says, "Any accounts or purchases made outside of this app will
3 be managed by the developer. Example."

4 Do you see that statement?

5 A. I do.

6 Q. You have no data as to whether actual users might read
7 that and realize for the first time, oh, Apple's not going to
8 manage the accounts or purchases. You don't have any data one
9 way or the other as to whether that might be new information
10 for actual users of apps, correct?

11 A. I think if you're going to a website to make a purchase,
12 you'll assume that whoever runs that website is --

13 Q. Do you --

14 A. -- maintaining that.

15 Q. Do you have data on whether all users know that or not?

16 A. I certainly don't have data on all users --

17 Q. Okay.

18 A. -- what they think.

19 Q. You would agree that some users probably don't know that
20 when they're clicking out, that the accounts or purchases made
21 outside of the app will be managed by the developer; you would
22 agree that at least some users might not recognize that,
23 correct?

24 A. I think most people in the world have been making
25 purchases on the web for decades now. I would be surprised if

1 people found this as new information.

2 **THE COURT:** Most people in the world? Really?
3 That's what you want to say?

4 **THE WITNESS:** That would be in America.

5 **BY MR. LO:**

6 **Q.** Sir, let's start with the basics. Do you agree that in
7 the context of an external link, meaning going from an app,
8 tapping on something, and then going out, at least some users
9 might not recognize that any accounts or purchases made
10 outside of this app will be managed by the developer? We
11 agree that at least some people might find this to be new
12 information? Or do you think a hundred percent of people
13 already know this?

14 **A.** I think if you're going to a website and making a
15 purchase, you assume that whoever's maintaining that website
16 is responsible for that.

17 **Q.** Okay. So your testimony is that you believe that a
18 hundred percent of the people who encounter this disclosure
19 screen understand the information that is highlighted on the
20 screen. That's your belief, correct?

21 **A.** I mean I'd say that I don't think this would be new
22 information to the vast majority of people that see this.

23 **Q.** So is it a hundred percent or is it not a hundred percent?
24 That's my question.

25 **A.** Maybe a small fraction of people are not familiar with

1 this. But, again, like I don't have data on how everyone
2 interacts with the web.

3 Q. Okay. But you're basing your testimony on your
4 professional opinion. Your professional opinion is that at
5 least a small portion of people will find the highlighted
6 passage to be new information, correct?

7 A. Potentially.

8 Q. Okay. Now, let's put those aside. Let's talk about what
9 you believe to be the majority.

10 You believe that the majority of people who tap on the
11 link understand that any accounts or purchases made outside of
12 this app will be managed by the developer, correct?

13 A. Fortnite already manages purchases and manages its own
14 accounts so --

15 Q. Sir, correct or incorrect?

16 A. Can you repeat the question?

17 Q. Sure. You believe that the majority of people who would
18 click on an external link, as dictated by the Apple
19 guidelines, would already know this information that is
20 highlighted on the screen that any accounts or purchases made
21 outside of this app will be managed by the developer, correct?

22 A. Yes, I would think so. You're clicking on a link that's
23 going to a website, it's then leaving the app, you're going to
24 another page. I think people would be able to understand
25 that.

1 Q. Okay. Putting aside everything else that is on the
2 screen, would you agree that if the majority of people already
3 know that the purchases or accounts will be managed by the
4 developer, then a reminder of something that they already know
5 is not going to change their mind; would you agree with that?

6 A. (Reviewing document.)

7 Can you clarify?

8 Q. What don't you understand?

9 A. Repeat the question.

10 Q. Sure. For those people that you believe know ahead of
11 time that if I tap on this click -- if I tap on this link, the
12 accounts or purchases will be managed by somebody else. So if
13 we then show them just this text, putting aside everything
14 else on the screen for now, that's not going to change their
15 mind, right, because you're just telling them something they
16 already know.

17 A. I think that sentence in and of itself would not change
18 their mind.

19 Q. Okay. So if a person knew this, then saw this particular
20 sentence, they're going to click "Continue" under your
21 professional opinion because we're just telling them something
22 they already know, correct?

23 A. I mean I think they're more likely to cancel out of this
24 because of everything that's going on here with the --

25 Q. Sir, I'm -- I'm limiting my question to just one portion

1 at a time. You'll have your opportunity to talk about other
2 portions of it.

3 With respect to whether accounts or purchases will be
4 managed by the developer, your testimony is that the majority
5 of people know that. And so if they know that, then seeing
6 this is not going to suddenly make them cancel, correct?

7 **A.** I don't think that this sentence in and of itself would
8 cause someone to cancel.

9 **Q.** Okay. Good.

10 Then let's take the next sentence: Your App Store account
11 store payment method and related features such as subscription
12 management and refund requests will not available.

13 Do you see that sentence?

14 **A.** Yes.

15 **Q.** First, is it your belief that 100 percent of people who
16 are going to click on the link, the external link, already
17 know that fact?

18 **A.** (Reviewing document.)

19 Well, I mean, through our web purchase flow --

20 (Simultaneous colloquy.)

21 **BY MR. LO:**

22 **Q.** Yes or no, sir.

23 **A.** -- still -- can you repeat it again?

24 **Q.** Sure. Is that information in that sentence that starts
25 with "Your App Store account," in your professional opinion,

1 does everybody who clicks on an external link know the
2 information in that sentence? Yes or no?

3 A. I think they'd be confused by that sentence.

4 Q. Do they know that information or do they not?

5 A. (Reviewing document.)

6 I can't really say.

7 Q. Okay.

8 A. But --

9 Q. I'll take that. For those who don't know that
10 information, would you agree that it's helpful to provide that
11 information for them so that they can make an informed
12 decision?

13 A. I think it's confusing the way that it's calling out
14 refund requests, saying those won't be available. Fortnite
15 offers refunds today. We have a customer service team that
16 can handle that kind of thing. Furthermore you're not using
17 your App Store account anyway, you're using your Fortnite
18 account. So that's somewhat irrelevant.

19 Q. Sir, I'm not asking you if it's relevant or irrelevant.
20 For those people who don't know that this is going to be the
21 case, would you agree that it would be good to let them have
22 that information before they leave the native app? Yes or no?
23 Or you don't have an opinion on it one way or the other.

24 A. I mean if someone was opening a website to begin with --

25 Q. Sir, yes? Yes? No? Or you don't have an opinion one way

1 or the other?

2 **A.** I'm sorry. Can you repeat the exact question again?

3 **Q.** Sure. For those people who don't know the information in
4 that sentence that starts with "Your App Store account," would
5 you agree that it would be a good thing to give them that
6 information so they can make an informed decision? Yes, no,
7 or you have no view on that one way or the other?

8 **A.** I mean people should be able to make an informed decision.

9 **Q.** Okay. And I take it that your answer is the same as the
10 previous sentence which is that if that sentence tells users
11 something they already know, then they're just going to hit
12 "Continue," right? They're not going to cancel by seeing
13 information that they already know. Would you agree with
14 that?

15 **A.** Personally seeing the "Refund request will not be
16 available" line in its own, I would cancel out of this.

17 **Q.** Okay.

18 Would you agree that if the message simply informed the
19 user that the refunds would have to be processed by the
20 developer, that that's not going to cause anybody to un- --
21 unjustifiably click "Cancel"? Would you agree with that, if
22 the statement was more neutral?

23 **A.** Neutral language could be helpful.

24 **Q.** Okay. And so if -- I know you dispute whether this
25 language is neutral. But you don't have a problem with

1 telling people who are about to tap out of the app that, hey,
2 your refund is going to be -- is going to be handled by Epic
3 Games. You don't have a problem telling users that, correct?

4 **A.** It still seems strange that you need to say this at all
5 because you're not saying this about Uber --

6 **Q.** Sir.

7 **A.** -- you're not saying that about Amazon --

8 **Q.** Sir, do you think it is a bad idea to let people know that
9 when they tap out of the app, that the refunds are going to be
10 clicked -- are going to be handled by Epic Games. Do you
11 think that's a bad idea?

12 **A.** I'm just really not sure it's necessary. People have been
13 making purchases on the web, on their phone for a long time
14 now.

15 **Q.** Well, do you believe that every single person who taps out
16 knows that the refunds will now be handled by Epic Games; is
17 that your opinion?

18 **A.** I mean I know that when I purchase something --

19 **Q.** Sir.

20 **A.** -- through Uber --

21 **Q.** Yes?

22 **A.** -- I need to contact Uber --

23 **Q.** Sir, yes or no, is it your view that 100 percent of
24 individuals who tap out know that the refund will be handled
25 by Epic Games or whomever the developer is, yes or no?

1 **A.** I mean it's hard to say that because I don't know of a
2 single app that's using the external purchase link. People
3 haven't gone through this flow before but --

4 (Simultaneous colloquy.)

5 **BY MR. LO:**

6 **Q.** Okay. So you don't know one way or the other, right?

7 **A.** But I mean generally when people are making purchase from
8 Fortnite, they're contacting us about those things.

9 **Q.** Okay. So you can't imagine a single person who, upon
10 tapping on that link, doesn't realize that the refunds will be
11 handled by Epic Games; that's your testimony, right?

12 **A.** I mean it's possible.

13 **Q.** Okay. So you -- for those people that you concede are
14 possible, do you think it's a good idea to at least let them
15 know that, hey, your refund is going to be processed by Epic
16 Games just so they have that information and can make an
17 informed decision? For those individuals, would you agree
18 with that?

19 **A.** Why don't you show a pop-up like that for Uber?

20 **Q.** Sir, focus on my question. Do you agree that is a good
21 idea or you disagree? You think it's a bad idea to let people
22 know that when they tap on it, your refund is going to be
23 canceled by -- is going to be processed by Epic? Good idea or
24 bad idea or no view whatsoever?

25 **A.** I like giving people the ability to make an informed

1 decision, also know that our website likely clearly has
2 options for refunds and things like that.

3 Q. Okay. So you -- you -- you like giving people the
4 information so they can make an informed decision, correct?

5 A. I think clear communications are good.

6 Q. Okay. And, again, I know you'll quibble with the language
7 here, but if the language were neutral and you're just giving
8 users information, you would agree -- an information that they
9 already know, you would agree that they're not going to just
10 cancel out because for the sake of canceling out, right? If
11 you're giving them neutral information that they already know,
12 they will then just say I already know this, continue.

13 Correct?

14 A. (Reviewing document.)

15 I still feel like the way --

16 Q. Correct?

17 A. -- that all of this is presented is going to turn people
18 away.

19 Q. I'm not asking about this specific language. I'm taking
20 your view that there is a neutral way to express these
21 concepts to the user.

22 In that situation, if you expressed it in a neutral way
23 and you tell the users something they already know, can we
24 agree that they're -- that a -- that they're smart and they'll
25 just click "Continue" because they're just seeing something

1 they already know; would you agree with that?

2 **A.** That's not my experience with people going through the
3 Android download flow scare screens.

4 **Q.** So you think -- follow my question.

5 Assume we have neutral language that you believe is
6 neutral that gives information to consumers. In that
7 situation, even if you are giving them information they
8 already know, you believe that they are capable of making a
9 smart decision which is I already know this, I'm just going to
10 click "Continue," don't you?

11 **A.** It's possible, but I still just disagree with the
12 existence of this scare screen overall in this kind of
13 context.

14 **Q.** Okay. It's possible. Yes?

15 **A.** Yes.

16 **Q.** All right.

17 Let's go to Epic's opening papers, and we'll put it up on
18 the screen, but if you want to look at it on paper, let's turn
19 to tab 13.

20 (Demonstrative published.)

21 **BY MR. LO:**

22 **Q.** And it's going to be pages 8 to 9. And it's the section
23 "URL Restrictions."

24 First, have you ever read Epic's papers in connection with
25 these proceedings?

1 **A.** I have not.

2 **Q.** Okay. Why don't you go ahead and read this to yourself.
3 I'm going to ask you a specific question. I'll represent to
4 you this is what Epic submitted to the Court.

5 **A.** (Reviewing document.)

6 **THE COURT:** What page and line are you at?

7 **MR. LO:** Pages 8 to 9 and --

8 **THE COURT:** I see it.

9 **MR. LO:** Line 23.

10 **THE WITNESS:** This is supposed to be the "URL
11 Restrictions" section; is that correct?

12 **BY MR. LO:**

13 **Q.** Yes, it's about those restrictions, yes.

14 **A.** (Reviewing document.)

15 **Q.** And specifically just give you the context, the -- this is
16 Epic's submission regarding the restriction as to whether you
17 can include parameters in the URL. Just to give you a little
18 bit of context.

19 **A.** (Reviewing document.)

20 Okay.

21 **Q.** All right. And so again, you understand having read this
22 now that this is in part about the inability for a developer
23 to use a -- parameters with their URL, correct?

24 **A.** Yes.

25 **Q.** Okay. And let's start with line 25. It says, "Users who

1 follow the link must navigate anew on the web page to find the
2 purchase they want to make and may also need to sign in again
3 to make the purchase." Do you see that statement?

4 **A.** Yes.

5 **Q.** I take it you generally agree with that statement,
6 correct?

7 **A.** Because of these restrictions, that's what would happen.

8 **Q.** Right. Exactly. This is -- this -- you agree that
9 Apple's restrictions cause this to happen, meaning what's on
10 the screen.

11 **A.** Yes.

12 **Q.** Okay. Now the statement says the user may also need to
13 sign in again to make the purchase. Do you see that, sir?

14 **A.** Yes.

15 **Q.** And you agree with that, in other words, sometimes they
16 need to sign in, sometimes they don't, correct?

17 **A.** I assume you need to be in a signed in state to make a
18 purchase.

19 **Q.** Sure. And when you land -- when one lands on that page,
20 there are two options. One is the user is already signed in
21 on their browser and therefore no longer needs to sign in,
22 correct?

23 **A.** I don't know if that's necessarily how it works, just
24 being signed in on a browser, then you click this link and
25 then it opens another page, will you be signed in there? I

1 don't know.

2 Q. If a user is already signed in to Epic Games Store and
3 then they click on a link within an app that takes them to the
4 Epic Games Store, you don't know whether that browser remains
5 signed into the Epic Games Store?

6 A. So they would have been signed in on the browser already
7 on their phone.

8 Q. Sure.

9 A. Then they would have clicked this link. Yeah, I don't
10 know actually what would happen.

11 Q. Oh, you don't -- you don't know whether they would remain
12 signed in if they're using the same browser?

13 A. If it was like a different window, no, I'm not sure
14 exactly what would happen there.

15 Q. Hmm. Okay.

16 Now, the sign-in issue, Epic goes on to write that this
17 will result in a frustrating experience that users may abandon
18 before completing a purchase or may lead users purchasing
19 products for the wrong accounts. Do you see that, sir?

20 A. Yes.

21 Q. Do you agree that forcing users to do a sign-in is a
22 frustrating experience that may make users abandon the
23 process?

24 A. I know that I frequently forget my kind of log-in
25 information, and that will alone will kind of cause me to

1 abandon making a purchase.

2 Q. So --

3 A. Can you repeat the question?

4 Q. Sure. I think you've answered it. You think it's a bad
5 design to have to have people sign in before they make a
6 purchase, right? It's frustrating.

7 A. Well, I think you should -- it's fine to be signed in to
8 make a purchase, but I know that when I'm navigating from, you
9 know, in this case it would be a game you're already logged in
10 to Fortnite, you're going to make a purchase requiring a
11 second log-in there, for me as a player would be kind of
12 annoying.

13 Q. All right. Let's take a look at tab 14. And I want to
14 talk a little bit about page 3 of tab 14. And I want to talk
15 a little bit about how the Epic Games Store operates.

16 A. Okay.

17 (Demonstrative published.)

18 BY MR. LO:

19 Q. Do you recognize that page 3 of tab 14 is just the front
20 page of the Epic Games Store?

21 A. Yes.

22 Q. Okay. Then let's turn to page 5. And I'll represent to
23 you, in case you didn't know that, that this is one of the
24 games that is offered on the Epic Games Store.

25 (Exhibit published.)

1 **BY MR. LO:**

2 **Q.** Do you recognize it?

3 **A.** I do not.

4 **Q.** Okay. Now I want you to make two assumptions for my
5 following questions. The first is that you, the user, has not
6 purchased this particular game. Okay? Are you with me?

7 **A.** Okay.

8 **Q.** And -- and the second is you have not logged in to the
9 Epic Games Store yet. Okay. You got those two assumptions?

10 **A.** Okay.

11 **Q.** Now, on the Epic Games site when we're at this particular
12 Womanizer game, there are three options, buy now, add to cart,
13 and add to wish list.

14 Do you see that on the right-hand side of the Epic Games
15 Store page?

16 **A.** I do.

17 **Q.** Okay. Can you tell the Court what happens when somebody
18 clicks on the "buy now"?

19 **A.** I don't know.

20 **Q.** All right. Well, we did try that. And if we look at
21 page 6.

22 (Demonstrative published.)

23 **BY MR. LO:**

24 **Q.** -- it immediately leads the user to the sign-in page. In
25 other words, you can't engage in the buy now without signing

1 in first on the Epic Games Store. Did you know that, sir?

2 **A.** If you aren't already signed in, like I said before, I
3 kind of expect that you'll need to sign in at some point to
4 make a purchase.

5 **Q.** Okay. Well, let's go back to the original page. And
6 let's go through the other options.

7 (Demonstrative published.)

8 **BY MR. LO:**

9 **Q.** So going back to page 5. Do you know what happens when a
10 user clicked "Add to cart" on the Epic Games Store?

11 **A.** I do not. I -- I don't work on the Epic Games Store.

12 **Q.** Okay. It forces a sign-in exactly the same as what we
13 saw. You can't add to your cart unless you first sign in to
14 the Epic Games Store.

15 Did you know that that's how the Epic Games Store
16 functions?

17 **A.** I did not, but like I said, I expect that you would need
18 to be able to sign in at some point to be able to do some kind
19 of payment processing, and this is different than going from
20 within Fortnite where you've already signed in and then trying
21 to buy something.

22 **Q.** Okay. But the way that Epic Games Store provides its
23 functionality, one cannot go and add a couple of games into
24 the cart before deciding whether to sign in or not. The --
25 before you can add the first item to the cart, they have to

1 sign in first. Did you know that, sir?

2 A. I did not.

3 Q. Okay. What about the "add to wish list," can you guess
4 what happens when a user clicks on the "add to wish list" on
5 the Epic Games Store?

6 A. Does it make you sign in?

7 Q. Exactly. So every option on every product in the Epic
8 Games Store, the user has to sign in first before they can do
9 anything else. Correct?

10 Any reason to disagree with that?

11 A. From what you've just shown me, if you're not signed in on
12 this computer at all and you're pressing "buy now" or "add to
13 cart" or "add to wish list," yeah, it looks like it makes you
14 sign in.

15 Q. Okay. And Epic doesn't believe that forcing a user to
16 sign in before they can add something to the cart will be a
17 frustrating experience for users, right?

18 A. I don't know what they were thinking exactly when they
19 made this.

20 Q. Does Epic think that forcing a user to sign in first
21 before they can add something to their cart is a disservice to
22 the many developers who choose to list their products on the
23 Epic Games Store?

24 A. Can you repeat that?

25 Q. Sure.

1 Does Epic believe that forcing users to sign in before
2 somebody can add something to cart or to add to their wish
3 list inhibits the ability of third-party developers to sell
4 their products on the Epic Games Store?

5 **A.** I don't know that I could speak to what folks at Epic were
6 thinking when they made this specific functionality.

7 **Q.** Let me ask you because you're here testifying in your
8 professional capacity, do you believe that a design that
9 forces people to sign in before you can add something to cart
10 or add to a wish list is added friction and does a disservice
11 to the developers who choose to list their games on the Epic
12 Games Store? Do you believe that in your professional
13 opinion?

14 **A.** I don't know if I have an opinion on that.

15 **Q.** No view one way or the other?

16 **A.** No. Like I said, I don't work on the Epic Games Store.

17 **Q.** Well, I'm not asking you about your work. I'm just asking
18 you -- you've been testifying about the user experience. Do
19 you think it's a bad user experience to force people to sign
20 in before they can add something to cart?

21 **A.** I kind of wonder what -- what Amazon does for things like
22 this. I don't necessarily know why they would need people to
23 sign in before adding things to the cart. There may be a
24 reason. But having not worked on it, it's really hard for me
25 to say.

1 Q. Okay. By the way, Epic does offer a number of ways for
2 users to sign in, correct?

3 A. Yes.

4 Q. So, for example, if you go to tab 12.

5 (Demonstrative published.)

6 BY MR. LO:

7 Q. We can see what those options are, correct?

8 A. Yes.

9 Q. And some of those options include a Facebook sign-in and a
10 Google sign-in, correct?

11 A. I don't know if this is necessarily the latest set of
12 options. I have seen a Facebook sign-in and a Google sign-in
13 at some point in the ecosystem. But I'm less familiar with
14 this exact screen as it appears in game today.

15 Q. I'll represent to you that we took this screenshot within
16 the last couple of weeks.

17 A. Okay.

18 Q. So it's relatively contemporaneous.

19 A. Uh-huh.

20 Q. Okay. Are you familiar with the Google and Facebook
21 sign-in functionality whether it's on the Epic Games Store or
22 through your other professional experience?

23 A. I've used Google sign-in frequently.

24 Q. Okay. And with the Google sign-in, what a user can do is
25 to use their Google credentials in order to sign in to their

1 Epic Games account, correct?

2 A. From what I understand, yes.

3 Q. Right. So if you are in a browser where you are otherwise
4 signed in to your Google account, and then you go to the Epic
5 Games Store, then you can just choose to use that same
6 credentials, that same set of credentials to sign in to your
7 Epic Games account, correct?

8 A. Yes, in a browser. I suppose that this is in game as
9 well.

10 Q. Right. Meaning that you would no longer need to remember
11 what your password is because your password is already part of
12 your signed-in Google account, correct?

13 A. It makes it an easier experience, yes.

14 Q. Right. So, again -- well, would you agree that a number
15 of Epic's users have Facebook accounts and have Google
16 accounts; you understand that, right?

17 A. I don't know the exact amount, but presumably that's why
18 those options are here.

19 Q. Right. And so for those people who are coming to the Epic
20 Games Store website, whether through an external link or just
21 by using the browser, they can easily take advantage of their
22 Google sign-in or their Facebook sign-in functionality,
23 correct?

24 A. Those options are available here.

25 Q. All right. And let's just see how Epic describes those

options. Let's take a look at tab 15, page 2.

(Demonstrative published.)

BY MR. LO:

Q. This is the portion in the Epic Games Store about linking your social accounts to your Epic Games Store. And it reads, "We offer support to integrate Facebook and Google logins within our Epic account system. This allows you to log into your Epic account without requiring a separate password as long as you're actively logged into Google or Facebook."

Do you see that, sir?

A. Yes.

Q. Okay. And is that consistent with your understanding of how the Google and Facebook log-ins work?

A. Yes. I usually choose those options so that I don't have to enter a separate password.

Q. Okay. And, again, that would apply whether one is navigating directly to the website from the browser or whether one is led to the browser through a link in an app, correct?

A. I believe so.

Q. Okay. You yourself are an iPhone user, as I understand it, correct?

A. Yes.

Q. And you are familiar with the Keychain tool on iPhones?

(Simultaneous colloquy.)

/ / /

1 BY MR. LO:

2 Q. -- familiar with the Keychain tool on iPhones?

3 A. What is the Keychain tool?

4 Q. It's a tool to, among other things, store your passwords.

5 A. Just general password management system?

6 Q. Yes.

7 A. Yeah, I believe I use that.

8 Q. Okay. So you understand that that is another way that you
9 can use to store and to use your passwords when you hit a
10 website that requires a log-in, correct?

11 A. Yes. It's similar to Google's kind of password
12 autopopulate feature.

13 Q. Okay. Now, I want you to assume with me that an app
14 includes an external link that takes a user to the Epic
15 sign-in page. Are you with me so far?

16 A. Okay.

17 Q. If the user then signs in, whether using the Keychain,
18 using Google, using Facebook, at that point Epic would have
19 the ability to show the user what they were browsing in the
20 app, correct? Once a user logs in.

21 A. It -- the link is taking them to the sign-in page?

22 Q. Yes.

23 A. I think after they signed in, they would need to figure
24 out where to go in the -- I think it depends on which sign-in
25 page. I don't really understand.

1 Q. Well, Epic is capable of designing its website so that as
2 soon as the user signs in, it can show that user here's what
3 you were previously browsing in the app, correct?

4 A. Which website are you talking about?

5 Q. I'm saying that Epic, with all of its many developers,
6 have that capability to design its website to function that
7 way. Would you agree? Or do you not know?

8 A. Can you clarify?

9 Q. Sure. If a user signs in to the Epic Games Store, does
10 Epic have the capability to then show that signed-in user
11 here's what you've been browsing previously in your last
12 session?

13 A. Yes, I believe so.

14 Q. Okay. Thank you.

15 And so that would mean that Epic could also show the user
16 what they were browsing in an app if they came from an app
17 once they signed in, right?

18 A. Yes.

19 Q. Okay. And in that situation, once they've signed in, if
20 the payment information is stored, then the user would no
21 longer need to enter the payment information, correct?

22 A. I don't know exactly what would happen with the payment
23 information but potentially.

24 Q. Well, Epic does store payment information, correct?

25 A. I -- actually don't know exactly what they do there.

1 Q. All right.

2 A. This is probably some -- something like that.

3 Q. Okay. Let's take a look at the motion again. And
4 let's -- let's tap 13 and let's go to page 17, line 3.

5 (Demonstrative published.)

6 BY MR. LO:

7 Q. This is again just statements that Epic has made to the
8 Court. And it's talking about going to the generic page of
9 the developer's website.

10 So I'll start with the sentence in line 4: To complete a
11 purchase, the user would need to again, A, log in to their
12 account even though they were already logged in to their
13 account in the app, and B, search for the product they wanted
14 to purchase.

15 Do you see that?

16 A. Yes.

17 Q. Okay. And that suggests, at least the way I read it, is
18 that the user would need to do both of those things. They
19 need to log in. And then after they log in, they would need
20 to search for the product that they had wanted to purchase.

21 Is that how you read that sentence, too?

22 A. Yes.

23 Q. Okay. And that's actually not accurate, correct? Because
24 once a user logs in, Epic has the technology and the software
25 developers to then show them the product that they wanted to

1 purchase. They wouldn't need to search for it again, correct?

2 **A.** I don't know if we could actually maneuver people around a
3 page like that necessarily just based off of their account if
4 they're clicking a kind of generic link. So I'm not really
5 sure.

6 **Q.** You don't know if once a user signs in, Epic can
7 dynamically show to them here's what you've been browsing or
8 here's what's in your cart? You don't know whether Epic has
9 the capability of doing that, sir?

10 **A.** I'm just trying to think about how our, like, V-Bucks
11 purchase page works. Most of that is displayed on I think
12 like one screen. So it would be taking someone to a part of
13 the screen that they were looking at. It's potentially
14 possible.

15 **Q.** Well, let's talk about another sophisticated developer.
16 You understand you're a user of Amazon.com, correct?

17 **A.** Yes.

18 **Q.** And you understand that as soon as you log in to Amazon
19 and even when you're on the Amazon.com home page, there are
20 customization options on that home page that, among other
21 things, show you what you've been looking at in the past,
22 correct?

23 **A.** Yes.

24 **Q.** And among other things, it may suggest new items to you
25 based on what you've purchased in the past, correct?

1 **A.** Yes, I've seen those.

2 **Q.** So developers do have tools to show a user what they have
3 been previously looking at once they sign in. That's
4 technology that is readily available to all developers,
5 correct?

6 **A.** Okay.

7 **Q.** So, again, once a user logs in to their account, you agree
8 that a sophisticated developer or even just a competent
9 developer could make their website so that the user would not
10 need to also search for the product they wanted to purchase;
11 would you agree with that?

12 **A.** No. I still think this would be really difficult in the
13 context of our V-Bucks purchase page. If they were just
14 scrolling through there, and I mean the external purchase link
15 isn't even available on that page so they would then have to
16 leave it, find that link somewhere else, take them out through
17 that scare screen, log in to this other page. I don't know if
18 we'd be able to track like just which V-Bucks pack they were
19 even looking at on a given screen and navigate them back to
20 that.

21 **Q.** You don't think that Epic has the ability to track that
22 information?

23 **A.** I -- the way the V-Bucks tiles are laid out, like someone,
24 if they wanted to make an external purchase, they wouldn't be
25 clicking into it. They would just be looking at them on the

1 screen, and then they would have to navigate back to that
2 other screen outside of the purchase flow with the external
3 purchase link.

4 But, like, we don't track just what people are looking at
5 on a screen. Maybe if they clicked it, we would then be able
6 to show it to them. But it's just hard for me to imagine how
7 all this would work in the context of the external purchase
8 link in the way that Fortnite works today.

9 Q. All right. Let's take a look at Epic's own privacy
10 statements to see what Epic says it tracks. And that's in
11 tab 20 of your binder.

12 (Demonstrative published.)

13 BY MR. LO:

14 Q. And let's take a look at section B, and it starts towards
15 the bottom of page 2.

16 A. Okay.

17 Q. And it says: We collect some information automatically
18 when you visit, access, or use the Epic services. This
19 includes information about your game play or application
20 usage, purchases, entitlements, and other activity in the Epic
21 services typically associated with your account if you are
22 logged in, into your Epic account, or use a third-party
23 account to access the Epic services or with an identifier we
24 have assigned to your device or profile.

25 Any reason to disagree that Epic actually tracks all this

1 information automatically when users are using the Epic
2 services?

3 **A.** If that is saying they tracked us, then I believe it.

4 **Q.** Okay. Then let's read also the first bullet point below
5 that starts with usage information because it provides a
6 little bit of clarity on what that means.

7 Usage information is statistics about how you interact
8 with the Epic services, including the application you used or
9 the game you played, how long you used or played it and when,
10 game play attempts, progression and results, and it goes on.
11 But at the -- near the bottom, it includes page views, time
12 spend on a page, number of clicks, and platform type.

13 Do you see that, sir?

14 **A.** Yes.

15 **Q.** Again, any reason to believe that is not an accurate
16 statement about the information that Epic already collects?

17 **A.** No.

18 **Q.** Okay. So Epic actually does collect information about
19 what the user's looking at. Whether it chooses to show that
20 information to the user after they log in is really at the
21 discretion of Epic, correct? It's not something that Apple is
22 prohibiting or forbidding, correct?

23 **A.** I suppose that's true, but in the context of the V-Bucks
24 page, I mean there's like three or four packs of different
25 V-Bucks that are on a given screen. I don't understand how we

1 could actually, like, navigate someone specifically to one of
2 those packs if they had an intention to purchase one of them.

3 Q. Well, if a user is looking at a screen with four different
4 packs, Epic has the ability to show those same four packs when
5 the user logs on to the Epic Games website, correct?

6 A. Potentially, yeah.

7 Q. Okay. And if a user happens to be on a specific screen
8 with a specific pack, Epic knows that and it's got the
9 capability to show that specific pack on the Epic Games
10 website after the user logs in, correct?

11 A. Maybe.

12 Q. Earlier on we were looking at the Epic Games Store for a
13 specific game.

14 Now if a developer wants to put a website link on the Epic
15 Games Store, Epic allows that, right?

16 A. I'm not as familiar with what people can do on the Epic
17 Games Store since I don't work on that.

18 Q. Okay. But you are familiar with the usage of external
19 links and what you say is friction associated with the use of
20 external links, correct? As part of your professional job?

21 A. Just designing some of the websites I've worked on.

22 Q. Okay. Let's take a look at what the Epic Store guidelines
23 are with respect to the links that appear on the Epic Games
24 Store. And that's in tab 21.

25 (Demonstrative published.)

1 **BY MR. LO:**

2 **Q.** Have you looked at the content guidelines for the Epic
3 Games Store before?

4 **A.** No. I'm not familiar with them.

5 **Q.** Okay. But you are familiar with interpreting rules for
6 links because you --

7 **THE COURT:** Stop.

8 **MS. MOSKOWITZ:** I've tried to wait it out, but the
9 Epic Games Store, the foundation, the witness doesn't know
10 this stuff. And if they wanted an Epic Games Store witness,
11 they could have put it on their list, but they didn't. He's
12 just not capable of speaking to these issues.

13 **THE COURT:** Response. And how is it within the
14 scope?

15 **MR. LO:** Well, first, Your Honor, on the scope, both
16 sides agreed that we would call the witnesses only once so we
17 would not be on cross, be just limited to the scope on the
18 direct examination.

19 **THE COURT:** All right. So what about foundation?

20 **MR. LO:** It's fine if he wants to say he doesn't know
21 it, but I think that goes --

22 **THE COURT:** You keep going on when he says he doesn't
23 know it.

24 **MR. LO:** Well, but, Your Honor, he is testifying as
25 to what causes friction. And I think it's fair game to ask

1 him about his own property or the -- the company's own
2 property. And at the minimum, if he knows, purports to know
3 everything about how Apple's purported friction works and has
4 no understanding of what goes on in their own product
5 pipeline, I think at a minimum it undermines his credibility.
6 And more importantly I think it establishes that Apple may
7 have a good faith basis for some of the rules that it puts in
8 place.

9 **THE COURT:** How does he have any -- his testimony
10 impact at all Apple's good faith when Apple is not even --
11 he's not testifying on behalf of Apple?

12 **MR. LO:** Because the --

13 **THE COURT:** Are you going to put someone else on that
14 said that they specifically looked at these regulations from
15 Epic's store in deciding? When I get all these documents, am
16 I going to show -- am I going to see information about Epic's
17 processes as the foundation for the good faith of Apple?

18 **MR. LO:** No, Your Honor.

19 **THE COURT:** Well, then it's not relevant to their
20 good faith, is it?

21 **MR. LO:** It is in this way, Your Honor, if I may. If
22 Epic -- if I can show that Epic --

23 **THE COURT:** I'm asking you, the issue of good faith
24 relates to Apple's conduct. If they never looked at this
25 stuff, then it's not relevant.

1 **MR. LO:** It -- it is insofar as what the industry is
2 doing. In other words --

3 **THE COURT:** Are you going to have an industry expert
4 come in?

5 **MR. LO:** He purports to be somebody who is
6 knowledgeable about how links work, about what the security
7 implications are of links, about what friction is. This is a
8 witness that purports to come in here and say that.

9 And so if Epic is imposing the very same limitations that
10 they say have no basis in Apple's own rules, then we believe
11 that that is relevant to that issue.

12 And I can -- I can lay the foundation, Your Honor. They
13 have rules about how many times a developer can put in a link.
14 They have rules about where that link can go. They have rules
15 about what can show up at that link.

16 And I can go into more detail, but I'm worried that the
17 witness is in the presence of the courtroom. But they have in
18 their own store the very restrictions that they are
19 challenging Apple on and saying that Apple has no real basis
20 to put those restrictions in place.

21 **THE COURT:** Response.

22 **MS. MOSKOWITZ:** First, counsel completely
23 mischaracterizes the entire testimony that this witness has
24 given. He has given his testimony as a developer, not as a
25 store manager. He has repeatedly said he doesn't understand

1 or have knowledge about the operation of the store, which is a
2 completely other aspect of Epic's business. Epic of course is
3 a large company and wears a lot of hats.

4 Mr. Shobin is here wearing his personal knowledge hat as a
5 developer and user interface experiences as a developer, and
6 speaking to Apple's requirements and the impact on users of an
7 app, not anything about what Mr. Lo is trying to achieve with
8 him.

9 **THE COURT:** Well, I disagree that it's that limited.

10 But you really have to work on this exam. You're driving
11 me crazy. I need you to be short without these incredibly
12 long questions where every time you ask a question, he asks
13 you to repeat it three times.

14 So move along.

15 **MR. LO:** I understand, Your Honor.

16 **THE COURT:** And we will be done with this witness
17 today. So get to it.

18 **BY MR. LO:**

19 **Q.** Turning to tab 21, Mr. Shobin.

20 (Demonstrative published.)

21 **BY MR. LO:**

22 **Q.** And going to the section that starts Page 4, linked-to
23 content.

24 **THE COURT:** Have you ever seen this document?

25 **THE WITNESS:** I have not.

1 **BY MR. LO:**

2 **Q.** Are you aware, Mr. Shobin, that Epic puts restrictions on
3 where a developer may put in links on the Epic Games Store?

4 **A.** I'm not aware of that.

5 **Q.** Okay. And you are not aware that Epic requires that any
6 links on the Epic Games Stores, the contents of the external
7 website to be consistent with what is in the Epic Games Store;
8 are you aware of that?

9 **A.** No, I'm not aware of any of the details around links
10 allowed in the Epic Games Store.

11 **Q.** Can you think of any reason why it would be a good
12 practice for Epic Games to require that the external website
13 be consistent with the description that a developer places on
14 the website on the Epic Games Store itself?

15 **A.** I think I don't understand what that means exactly.

16 **Q.** Okay. Are you aware that when a developer on the Epic
17 Games Store wants to include a link, that the -- where that
18 link goes has to meet Epic Games' content restrictions?

19 **A.** I wasn't aware of that.

20 **Q.** Okay. Can you think of any good reason why a store such
21 as Epic Games would want to control what content appears on a
22 third party's website?

23 **A.** I don't really know under what context this would be used
24 exactly.

25 **Q.** Did you know that the Epic Games Store allows its

1 developers to only provide one link on a single page in a
2 single location to an external website?

3 A. I -- I don't know exactly what people would be linking to.

4 Q. Okay. Now, you are a player of Fortnite, correct?

5 A. Yes.

6 Q. Okay. And so you are familiar with what's called the
7 Creator Economy?

8 A. Loosely, yes.

9 Q. Okay. And what is the Creator Economy?

10 A. I don't know that I'm familiar enough to explain that.

11 Q. What -- well, you are aware that Epic allows third-party
12 content creators to create rooms and maps for Fortnite,
13 correct?

14 A. Okay. Yes, through UEFN and creative violence.

15 Q. Okay. Right. So you have played games with those
16 third-party content in those games, correct?

17 A. In rare occasions. I mostly play LEGO Fortnite
18 personally.

19 Q. Okay. And are you aware whether those content providers
20 can provide any external links in their pages?

21 A. I don't know what rules are associated with that.

22 Q. All right. Well, let's put a little bit of context first.
23 Let's take a look at tab 33.

24 (Demonstrative published.)

25 / / /

1 **BY MR. LO:**

2 **Q.** Do you recognize this as an example of something that a
3 third party might create that people can use within the Epic
4 Fortnite games, just a room that a third party might create?

5 **A.** A room? No, I don't really recognize this. I usually
6 play LEGO Fortnite myself.

7 **Q.** Okay. So and are you familiar with the -- let's take a
8 look at tab 26.

9 (Demonstrative published.)

10 **BY MR. LO:**

11 **Q.** Have you ever seen -- first of all, you understand what an
12 island creator is, right?

13 **A.** Yes.

14 **Q.** Okay.

15 **A.** Um-hmm.

16 **Q.** And you understand that this is the set of rules that
17 Fortnite puts in for island creators who want to create
18 content for the Fortnite game?

19 **A.** It says Fortnite island creator rules.

20 **Q.** Okay. Let's take a look at 4.3.5.

21 (Demonstrative published.)

22 **BY MR. LO:**

23 **Q.** This is a section about what a creator of an island can
24 and cannot do. And I want to focus your attention on examples
25 of things that aren't allowed in your island's metadata.

1 Do you see that, sir?

2 A. Yes.

3 Q. Okay. And you see that Fortnite forbids a message in any
4 kind of island that says go to onlinestore.com to learn more.
5 Correct?

6 A. That's what it says.

7 Q. Okay. Any reason to -- any reason to believe that that is
8 not an actual rule that Fortnite puts in place?

9 A. It appears to be a rule.

10 Q. Okay. And another example of something that somebody
11 cannot do is to say that it's available now for 19.99,
12 correct? So they can't include pricing, correct?

13 A. As far as I know, people can't actually sell bespoke items
14 in their Fortnite islands to begin with. And so I can't -- I
15 don't really understand what the use case would be for saying
16 that something is available for a certain price. I don't
17 think that they can sell things --

18 Q. Right.

19 A. -- for use in Fortnite islands.

20 Q. Nor can, under 4.3.5.A, the island include any calls to
21 action outside Fortnite, correct? That's another rule that
22 Epic imposes on third-party creators who want to create
23 content for the Fortnite ecosystem, right?

24 A. If players can't even sell different items that they've
25 made in their Fortnite islands, I don't know even know what

1 the use case would be for other calls to action outside of
2 Fortnite, unless they are entirely unrelated from Fortnite.

3 Q. Okay. And -- and the reason Fortnite -- Fortnite doesn't
4 allow users to steer players outside of the ecosystem is
5 because it doesn't want those players to be scammed once they
6 leave the Fortnite ecosystem, right?

7 A. The -- I guess like the creator economy, I think is what
8 you called it. This is all managed by a different team within
9 Epic. I work on our first-party experiences like Battle
10 Royale, LEGO Fortnite, and Rocket Racing and Festival. And so
11 I don't really know what -- what would cause this requirement
12 to have come about. Presumably someone was thoughtful about
13 it.

14 Q. All right. And let's go to something that you probably do
15 know about, which is you previously worked on iOS app
16 marketing, correct?

17 A. Yes.

18 Q. And you are aware that many children play Epic Games,
19 right?

20 A. I don't know the exact, I guess, data on our users.

21 Q. Okay. But you understand that children play Fortnite, no?

22 A. I think we have age-gating processes set up in the game
23 to -- to prevent people that are underage from playing.

24 Q. Okay. And you are aware that in the iOS ecosystem,
25 there's something called ask to buy?

1 A. I don't know what that means.

2 Q. You don't know that Apple has a system where a child
3 cannot buy a product within an app unless the parent approves
4 it?

5 A. Is that Apple's parental controls?

6 Q. It is, yes.

7 A. Okay. I'm not particularly familiar with it.

8 Q. Okay. But you are familiar that there are parental
9 controls in the iOS ecosystem, right?

10 A. I've heard that, yes.

11 Q. And if a child plays the game and the parental controls
12 are on, you understand that those parental controls can
13 prevent the child from making an unauthorized purchase,
14 correct?

15 A. Well, that's what you're telling me now.

16 Q. You didn't understand that independently?

17 A. I didn't do a lot of research on Apple's parental
18 controls.

19 Q. Okay. Do you have an understanding of Epic's parental
20 controls?

21 A. Yes. I made a video promoting to parents how to use them.

22 Q. Okay. Because for a very long time, Epic did not have any
23 parent controls, correct?

24 A. I'm not sure when Epic actually added parental controls.

25 Q. Okay. Well, you are aware that Epic was sued by the FTC

1 last year?

2 **MS. MOSKOWITZ:** Objection, Your Honor.

3 **THE COURT:** Sustained.

4 **BY MR. LO:**

5 **Q.** Sir, would you agree that one difference when a user exits
6 the native app is that parental controls might not be
7 available unless the developer has enabled it?

8 **A.** Can you -- can you clarify?

9 **Q.** Let me -- let me rephrase the question.

10 You agree that not all developers have instituted parental
11 controls in their games, correct?

12 **A.** I don't know what all developers have done.

13 **Q.** Well, you know that Epic itself didn't institute parental
14 controls for a very long time, correct?

15 **A.** I don't know when Epic added parental controls.

16 **THE COURT:** That wasn't the question. Answer the
17 question. When you did -- you said you did a marketing thing
18 for parental controls.

19 **THE WITNESS:** Yeah.

20 **THE COURT:** Were there -- did you not know that at
21 some point they didn't have parental controls?

22 **THE WITNESS:** I -- I wasn't really sure what was in
23 it before then. People asked me to make a video promoting
24 them so that parents could learn how to use them.

25 **THE COURT:** And as you sit here today, you really

1 don't think that all game developers have or have not had
2 parental controls? Do they or do they not? Just answer the
3 question.

4 **THE WITNESS:** That maybe some don't, maybe some do.

5 **BY MR. LO:**

6 **Q.** Okay. And for the -- for the games that don't have
7 parental controls, would you agree that some parents might see
8 the disclosure sheet, what you call the scare screen, and
9 decide to stop their child from clicking out to the external
10 link because some parents may have a concern that if they
11 click out, the child is going to be able to make a purchase?

12 **A.** I -- I don't understand how if the child clicks that link,
13 the parent will see that screen.

14 **Q.** Children often play their iPads or their iPhones in the
15 presence of their parents, correct?

16 **A.** Maybe. I -- I don't have kids myself.

17 **Q.** Fair enough.

18 And would you -- would you at least agree that in some
19 cases, if the child is in the game, taps on something that
20 takes them out of the game, and what you call the scare
21 screen, the disclosure screen, comes up, some parents might
22 take notice and say what's going on, they're no longer
23 shooting at somebody, farming something, there's this big
24 white screen, that some parents might see that and pay
25 attention to see what's happening; do you agree with that?

1 **A.** Maybe. I don't know if the normal, like, behavior is that
2 the parent is watching the child play, honestly. So it's hard
3 for me to say. Maybe -- maybe they would notice it.

4 **Q.** Okay. And in that situation, at least some parents might
5 notice that and stop their kids from going to a site that
6 doesn't have parental controls, correct?

7 **A.** I don't think the screen actually said anything about
8 parental controls on it, though.

9 **Q.** The screen says you're going to an external website. Some
10 parents might see that and decide not to let their kids go to
11 an external website, stay in the game, correct?

12 **THE COURT:** Okay. Move on.

13 **MR. LO:** All right.

14 **Q.** Sir, if a child ends up from a game to an external
15 website, one way to prevent the child from making a purchase
16 is if the child doesn't have the parent's log-in credential,
17 right? If the child doesn't have the credentials, they can't
18 make a purchase; would you agree with that?

19 **A.** Yeah. If the child can't log in and you need to be logged
20 in to make a purchase, I can understand how they wouldn't be
21 able to make a purchase then.

22 **Q.** Right. But if the game developer is able to pass the
23 log-in information in the URL, then every time the child
24 clicks on a link, the child then becomes automatically logged
25 in to the third-party website, correct? That's what Epic

1 wants to do.

2 **THE COURT:** Mr. Lo, they can make the purchase while
3 they're there. I don't see how that helps you. They're in
4 the game. That means they can make the purchase.

5 **MR. LO:** Your Honor, they cannot make the purchase in
6 the game if the parental controls are on.

7 **THE COURT:** All right. Fine. Next question.

8 **BY MR. LO:**

9 **Q.** Sir, outside of the external links, you would agree that
10 Epic uses emails as a way to extend offers to customers,
11 correct?

12 **A.** We do use emails to communicate with players.

13 **Q.** Okay. And in fact, those emails are of great value to
14 Epic in terms of communicating with -- communicating offers
15 and purchases, purchasing options to players, correct?

16 **A.** It depends. Emails in general have a low kind of open
17 rate and click through rate. It has -- it has some value.

18 **Q.** Okay. Well, in -- while you were doing the marketing for
19 Fortnite, were you aware that Epic had a program where they
20 paid users \$10 if they subscribe to emails?

21 **A.** I wasn't aware of that.

22 **Q.** So let's take a look at tab 17 and see if that refreshes
23 your recollection.

24 (Demonstrative published.)

25 / / /

1 **BY MR. LO:**

2 **Q.** In the 2022, January 2022 time frame, were you working on
3 Epic Games promotions?

4 **A.** This is an Epic Games Store promotion, and I don't work on
5 that team.

6 **Q.** Okay. So you're not aware that the Epic Games Store
7 offered \$10 to folks if they subscribed by email?

8 **A.** I didn't know this, but seeing it now, I wish I signed up.

9 **THE COURT:** You what?

10 **THE WITNESS:** I wish I signed up and got these \$10
11 coupons. It sounds like a good deal.

12 **THE COURT:** It didn't refresh.

13 Next question.

14 **MR. LO:** Your Honor, may I take 30 seconds to
15 consult? I may be done.

16 **THE COURT:** You may.

17 (Pause in the proceedings.)

18 **MR. LO:** Your Honor, we'll pass the witness.

19 **THE COURT:** Redirect, limited to the scope of the
20 last exam.

21 **MS. MOSKOWITZ:** May I proceed?

22 **THE COURT:** You may.

23 **MS. MOSKOWITZ:** Thank you, Your Honor.
24
25

REDIRECT EXAMINATION

BY MS. MOSKOWITZ:

Q. I'm going to try to keep this brief and jump around.

You were asked sort of sentence by sentence on that scare screen about whether one sentence in isolation would cause a user to cancel. Do you remember those questions?

A. Yes.

Q. And to your knowledge, is that -- any of that information, even if correct, popped up for physical goods like Uber or other types of purchases on Amazon, for example?

A. No. When I order an Uber or a Lyft, I don't see anything like that.

Q. And if you go to link out to Amazon.com, their website, do you get a pop-up that says any of that?

A. I do not.

Q. And can you say that even a completely correct pop-up screen would not cause even a single user to drop out? In your experience, let me -- withdrawn.

In your experience with users seeing screens, is the fact that the screen is shown at all, separate and apart from what language may be in there, a cause of friction and a cause of user dropoff?

A. Yes.

Q. So even if the language on that screen was a hundred percent accurate and neutral and -- and not bold, is there

1 possibility of user dropoff?

2 **A.** Yes. I myself would probably just cancel out of it.

3 **Q.** You were also asked a few questions about adding to cart
4 and adding to wish list and -- and being signed in before you
5 could do that. Do you remember those questions?

6 **A.** Yes.

7 **Q.** Do you view signing in before adding something to the cart
8 as the same thing as being logged in within an app, going to
9 buy something, being sent somewhere else and being asked to
10 log in again, navigating back to the same thing you were
11 already looking at, then adding it to the cart and then buying
12 it, are those the same?

13 **A.** No. I don't believe so. And I don't think there's even a
14 cart in Fortnite where you would be doing that kind of thing.

15 **Q.** So in your view, do the questions that you were asked
16 about how this store -- Epic Games Store allows people to add
17 games to the cart analogous to the restrictions that Apple's
18 imposing on the external link entitlement?

19 **A.** It seemed like a totally different scenario.

20 **Q.** You were also asked a few questions about the -- the
21 restrictions on what these links can do. And you were being
22 asked questions that implied that they were being protective
23 of users. Do you remember those questions?

24 **A.** Yes.

25 **Q.** Does Apple require those same restrictions on links in

1 apps for any other type of link other than when someone is
2 going to make a purchase?

3 **A.** I don't know all of the requirements that Apple has for
4 links that appear in apps.

5 **Q.** Are any -- to your knowledge, do those requirements appear
6 for any type of link within an app other than a purchase link?

7 **A.** I think there are more requirements around the purchase
8 links than I've seen for -- for anything else.

9 **Q.** You were asked a few questions about how creators may work
10 within Fortnite. Do you remember those questions?

11 **A.** Yes.

12 **Q.** And I think you testified that you're not completely
13 familiar with how all that of that works; is that fair?

14 **A.** Yes. We have a separate team that kind of works on these
15 third-party experiences, whereas I'm on the first-party games
16 team.

17 **Q.** So it's possible you don't know the answers to these
18 questions, but let me just try a few.

19 I think you mentioned that your understanding is that
20 creators who create content within Fortnite are not able to
21 sell or create anything for sale; is that your understanding?

22 **A.** Yes. From what I understand, people just purchase the
23 same kind of cosmetics in our Item Shop that they can in our
24 first-party experiences and then they can use those in
25 third-party-made experiences. There isn't a scenario where

1 someone would have like a website or an out-of-game place
2 where you'd be going to make a purchase and then use those
3 items back in game. I don't think it works that way.

4 **Q.** So in your view, is creators being able to create
5 experiences within Fortnite but not sell anything the same, in
6 your view, or comparable to a developer creating its own app
7 that happens to be distributed through a store?

8 **A.** It seemed quite different because the external purchase
9 link, you were going to a page to buy something that then you
10 can use directly in the game itself. Whereas like I don't
11 even know what creators would be driving to out of the game.
12 It would be something that's entirely unrelated from the game
13 play experience itself. Maybe they want to sell like T-shirts
14 or something for real life usage.

15 **Q.** And briefly on parent controls, I just want to see if I
16 understand this correctly. You were asked a few questions
17 about Apple's parental controls and if a person was within the
18 game and the parental controls were enabled, that they would
19 be stopped from being able to make an in-app purchase. Is
20 that your understanding of what those questions were about?

21 **A.** Yes.

22 **Q.** And of course that implies they needed to be stopped
23 because the purchase information was already stored within the
24 IAP system; is that your understanding?

25 **A.** Yes.

1 Q. And so if a user follows a link externally to Epic's
2 website, hypothetically, would they have any payment
3 information stored unless their parents already allowed them
4 to or they themselves already input the information?

5 A. They wouldn't have any payment info stored if they hadn't
6 entered it already.

7 Q. Okay. So could this hypothetical individual linking out
8 make any purchases on that external purchase link without
9 someone having provided them with their credit card
10 information or PayPal credentials?

11 A. No. You would need the payment information to be able to
12 do that.

13 MS. MOSKOWITZ: No further questions, Your Honor.

14 THE COURT: Recross limited to the scope of those
15 four topics.

16 MR. LO: Nothing further for the witness, Your Honor.

17 THE COURT: All right, sir, you're excused.

18 THE WITNESS: Thank you.

19 THE COURT: Okay. I will -- I'd like you to pick up
20 these binders and take them back, and to give you the ones
21 that you gave me today. I may return others the next time
22 you're here.

23 We'll next meet Tuesday at 4:00 p.m. Pacific on Zoom.

24 Okay. Safe travels. We're adjourned.

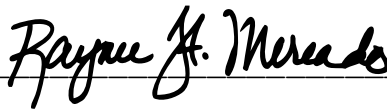
25 THE CLERK: Court is adjourned.

(Proceedings were concluded at 4:17 P.M.)

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CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter. I further certify that I am neither counsel for, related to, nor employed by any of the parties to the action in which this hearing was taken, and further that I am not financially nor otherwise interested in the outcome of the action.



Raynee H. Mercado, CSR, RMR, CRR, FCRR, CCRR

Friday, May 31, 2024